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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ~~247~~ 15

THE FIRE ASSOCIATION OF PHILADELPHIA, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED JULY 30, 1883.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 To the Honorable Samuel Blatchford, Associate Justice of the Supreme Court of the United States:

And now comes The Fire Association of Philadelphia, by Evarts, Southmayd & Choate, its attorneys, and complains that in the record and proceedings, and also in the rendition of a judgment of a plea in the suit between The People of the State of New York, plaintiffs, and The Fire Association of Philadelphia, defendant, which is in the supreme court of the State of New York on a remittitur from the court of appeals of the State of New York, being the highest court of law and equity of the said State in which a decision could be had, remitting to the said supreme court of the State of New York, the record in the said suit with an order reversing a judgment theretofore rendered in the said supreme court on the 14th day of February, 1883, in favor of the defendant and against the plaintiffs for the sum of ninety-eight dollars and seven cents, and directing that a judgment be entered in favor of the plaintiffs against the defendant for the sum of thirteen hundred and forty-eight dollars and forty-five cents, together with interest and costs, and that the same be enforced, upon which direction a judgment of reversal
2 was entered in said supreme court of the State of New York on the 9th day of May, 1883, with costs, in the sum of one hundred and eighty-four dollars and five cents, wherein was drawn in question the validity of a statute of the said State and of an authority exercised thereunder, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of such their validity, all of which appears in the record and proceedings in said suit, manifest error hath happened to the great damage of the said The Fire Association of Philadelphia.

Wherefore the said The Fire Association of Philadelphia, by its attorneys aforesaid, prays for the allowance of a writ of error and such other processes as may cause the said error to be corrected by the Supreme Court of the United States.

EVARTS, SOUTHMAYD & CHOATE,
Attorneys for Petitioner.

Allowed June 23d, 1883.
SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

3 Due & timely service of a copy of within petiton is hereby admitted.

ALBANY, ——, 1883.

Received by mail June 30, 1883.
LESLIE W. RUSSELL,
Attorney General, Att'y for the People.

[Endorsed:] U. S. Supreme Court. The Fire Association of Philadelphia, plaintiff in error, against The People of the State of New York, defendants in error. Petition. Evarts, Southmayd & Choate, att'ys for pl'ff in error.

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of New York in and for the third judicial district of said State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, on a remittitur from the court of appeals of the State of New York, being the highest court of law and equity of the said State in which a decision could be had, remitting to you, or some of you, the final decree or judgment of said court to be enforced in the suit between The People of the State of New York, as plaintiffs, and The Fire Association of Philadelphia, as defendant, wherein was drawn in question the validity of a statute of said State and of an authority exercised thereunder, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of such their validity, a manifest error hath happened, to the great damage of the said defendant, as is said, and as appears by its complaint, we, being willing that such
5 error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place before the justices aforesaid on the second Monday of October next; that the record and proceedings aforesaid being inspected, the said justices of the Supreme court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-sixth day of June, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and seventh.

[Seal of the U. S. Circuit Court, Northern District N. Y.]

WILLIAM H. BRIGHT,

6 *Clerk of the Circuit Court of the United States of America for the Northern District of New York, in the Second Circuit.*

The foregoing writ is allowed.
June 23d, 1883.

SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

7 Service of a copy of within writ of error is hereby admitted.
Albany, June 29, 1883.

LESLIE W. RUSSELL,
Att'y Gen'l, Att'y for Def't.

[Endorsed:] U. S. Supreme Court. The Fire Association of Phila-

delphia, plaintiff in error, against The People of the State of New York, defendants in error. Writ of error. Evarts, Southmayd & Choate, att'ys for pl'ff in error.

8 *Case Agreed Upon and Submitted Under Section* 1279 *of the Code of Civil Procedure.*

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK
vs.
THE FIRE ASSOCIATION OF PHILADELPHIA.

Leslie W. Russell, attorney general, plaintiffs' attorney.
Evarts, Southmayd & Choate, defendant's attorneys.

9 STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the first day of May, in the year of our Lord one thousand eight hundred and eighty-three, before the judges of said court.

Witness: The Hon. William C. Ruger, chief judge, presiding.

E. O. PERRIN, *Clerk.*

Remittitur, May 1st, 1883.

10 THE PEOPLE OF THE STATE OF NEW YORK, App'l'ts,
ag'st
THE FIRE ASSOCIATION OF PHILADELPHIA, Resp'd't.

Be it remembered that on the fourteenth day of February, in the year of our Lord one thousand eight hundred and eighty-three, The People of the State of New York, the appellant in this action, came here into the court of appeals, by Leslie W. Russell, attorney-general, &c., their attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the general term of the supreme court of the State of New York, and The Fire Association of Philadelphia, the respondent in said action, afterwards appeared in said court of appeals by Evarts, Southmayd & Choate, its attorneys.

Which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

11 Whereupon the said court of appeals having heard this cause argued by Mr. Leslie W. Russell, attorney general, of counsel for the appellants, and by Mr. Joseph H. Choate, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the general term of the supreme court, appealed from in this action, be, and the same hereby, reversed and judgment entered for plaintiffs for $1,848.45, with interest from January 15th, 1882, with costs.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the supreme court, there to be proceeded upon according to law.

12 Therefore it is considered that the said judgment be reversed & judgment entered for plaintiffs, &c., with costs as aforesaid.

And hereupon, as well as the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

E. O. PERRIN,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY *May 1st*, 1883.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[L. S.] E. O. PERRIN, *Clerk.*

13 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK
vs.
THE FIRE ASSOCIATION OF PHILADELPHIA.

The said parties agree upon the following case, containing a statement of the facts upon which the controversy between them depends, viz:

The defendant, The Fire Association of Philadelphia, is a corporation created and organized in the year 1820, by and under the laws of the State of Pennsylvania, for the transaction of the business of fire insurance, and having its principal place of business in the city of Philadelphia.

In the year 1872 it established an agency in the State of New York, which it has ever since maintained.

No question is here raised but that it has uniformly complied with all the requirements and conditions imposed by the laws of

14 this State upon fire insurance companies from other States establishing and maintaining agencies in this State, except the payment of the tax now in dispute upon premiums received by it in 1881 upon risks located within the State of New York, and which is the subject of this controversy, and has received from year to year certificates of authority from the superintendent of the insurance department of this State, as provided to be issued under the act, chapter 466 of the laws of 1853 and the subsequent acts amendatory thereof.

The act of the people of the State of New York passed May 11, 1865, three-fifths being present, being chapter 694 of the laws of

1865, entitled "An act in relation to the deposits required to be made and the taxes, fines, fees, and other charges payable by insurance companies of sister States," as amended by the act of 1875.

Chapter 60 provides as follows, viz:

"Whenever the existing or future laws of any other State of the United States shall require of insurance companies incorporated by or organized under the laws of this State, and having agencies in such other States, or of the agents thereof, any deposit of securities in such State for the protection of policy-holders or otherwise, or any payment for taxes, fines, penalties, certificates of authority, license fees, or otherwise, greater than the amount required for such purposes from similar companies of other States by the then existing laws of this State, then and in every such case all companies of such States establishing or having heretofore established an agency or agencies in the State shall be, and are hereby, required to make the same deposit for a like purpose in the insurance department of the State, and to pay the superintendent of said department for taxes, fines, penalties, certificates of authority, license fees, and otherwise, an amount equal to the amount of such charges and payments imposed by the laws of such State upon the companies of this State and the agents thereof; and the superintendent of the insurance department is hereby authorized to remit any of the fees and charges which he is required to collect by existing laws, except such as he is required to collect under and by virtue of this act: Provided, however, that no discrimination shall be made in favor of one company over any other from the same State."

The State of Pennsylvania, by an act passed April 4, 1873, and ever since in force, enacted as follows, viz:

Section 10. "No person shall act as agent or solicitor in this State of any insurance company of another State or foreign government in any manner whatever relating to risks until the provisions of this act have been complied with on the part of the company or association, and there has been granted to said company or association, by the commissioner, a certificate of authority, showing that the company or association is authorized to transact business in this State; and it shall be the duty of every such company or association authorized to transact business in this State to make report to the commissioner in the month of January of each year, under oath of the president or secretary thereof, showing the entire amount of premiums of every character and description received by said company or association in this State during the year or fraction of a year ending with the 31st day of December preceding, whether said premiums were received in money or in the form of notes, credits, or any other substitute for money, and pay into the State treasury a tax of three per centum upon said premiums; and the commissioner shall not have power to grant a renewal of the certificate of said company or association until the tax aforesaid is paid into the State treasury."

In the year 1881 the defendant, through its authorized agents in the State of New York, received for insurance against loss or injury

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the supreme court, there to be proceeded upon according to law.

12 Therefore it is considered that the said judgment be reversed & judgment entered for plaintiffs, &c., with costs as aforesaid.

And hereupon, as well as the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

E. O. PERRIN,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY *May 1st*, 1883.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[L. S.] E. O. PERRIN, *Clerk.*

13 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK
vs.
THE FIRE ASSOCIATION OF PHILADELPHIA.

The said parties agree upon the following case, containing a statement of the facts upon which the controversy between them depends, viz:

The defendant, The Fire Association of Philadelphia, is a corporation created and organized in the year 1820, by and under the laws of the State of Pennsylvania, for the transaction of the business of fire insurance, and having its principal place of business in the city of Philadelphia.

In the year 1872 it established an agency in the State of New York, which it has ever since maintained.

No question is here raised but that it has uniformly complied with all the requirements and conditions imposed by the laws of

14 this State upon fire insurance companies from other States establishing and maintaining agencies in this State, except the payment of the tax now in dispute upon premiums received by it in 1881 upon risks located within the State of New York, and which is the subject of this controversy, and has received from year to year certificates of authority from the superintendent of the insurance department of this State, as provided to be issued under the act, chapter 466 of the laws of 1853 and the subsequent acts amendatory thereof.

The act of the people of the State of New York passed May 11, 1865, three-fifths being present, being chapter 694 of the laws of

1865, entitled "An act in relation to the deposits required to be made and the taxes, fines, fees, and other charges payable by insurance companies of sister States," as amended by the act of 1875.

Chapter 60 provides as follows, viz:

"Whenever the existing or future laws of any other State of the United States shall require of insurance companies incorporated by or organized under the laws of this State, and having agencies in such other States, or of the agents thereof, any deposit of securities in such State for the protection of policy-holders or otherwise, or any payment for taxes, fines, penalties, certificates of authority, license fees, or otherwise, greater than the amount required for such purposes from similar companies of other States by the then existing laws of this State, then and in every such case all companies of such States establishing or having heretofore established an agency or agencies in the State shall be, and are hereby, required to make the same deposit for a like purpose in the insurance department of the State, and to pay the superintendent of said department for taxes, fines, penalties, certificates of authority, license fees, and otherwise, an amount equal to the amount of such charges and payments imposed by the laws of such State upon the companies of this State and the agents thereof; and the superintendent of the insurance department is hereby authorized to remit any of the fees and charges which he is required to collect by existing laws, except such as he is required to collect under and by virtue of this act: Provided, however, that no discrimination shall be made in favor of one company over any other from the same State."

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Section 10. "No person shall act as agent or solicitor in this State of any insurance company of another State or foreign government in any manner whatever relating to risks until the provisions of this act have been complied with on the part of the company or association, and there has been granted to said company or association, by the commissioner, a certificate of authority, showing that the company or association is authorized to transact business in this State; and it shall be the duty of every such company or association authorized to transact business in this State to make report to the commissioner in the month of January of each year, under oath of the president or secretary thereof, showing the entire amount of premiums of every character and description received by said company or association in this State during the year or fraction of a year ending with the 31st day of December preceding, whether said premiums were received in money or in the form of notes, credits, or any other substitute for money, and pay into the State treasury a tax of three per centum upon said premiums; and the commissioner shall not have power to grant a renewal of the certificate of said company or association until the tax aforesaid is paid into the State treasury."

In the year 1881 the defendant, through its authorized agents in the State of New York, received for insurance against loss or injury

by fire, upon property located within the State of New York, premiums to the aggregate amount of $196,170.22.

By the existing laws of the State of New York, in force in 1881, and at the present time (irrespective of the said act of 1865, as amended by said act of 1875), the defendant, as a fire insurance company from another State doing business in this State, was and is required to pay taxes upon the said amount of premiums, as follows, viz:

Two per cent. upon that portion of the said premiums which was received by its agents for insurance upon property located within the city and county of New York, to be paid to the "trustees of the Exempt Firemen's Benevolent Fund of the city of New York," as required by the act, chapter 548, laws of 1857, as amended by the acts, chapter 255, laws of 1858; chapter 633, laws of 1866; chapter 962, laws of 1867; chapter 297, laws of 1870; chapter 64, laws of 1877; chapter 89, laws of 1879.

Two per cent. upon all of the premiums which were received by its agents for insurance upon property located in other cities and villages of the State, to be paid to the treasurers of the fire departments of the several cities and villages respectively within whose corporate limits the property insured was situated, as required by the act, chapter 465, laws of 1875, as amended by chapter 359, laws of 1876; chapter 138, laws of 1878; chapter 153, laws of 1879.

Eight-tenths ($\frac{8}{10}$ths) of one per cent. upon said premiums, as premiums received by the said company on business transacted
17 in this State, to be paid into the State treasury as a tax on its corporate franchise or business, as required by chapter 542, laws of 1880, as amended by chapter 361, laws of 1881.

The defendant did, in fact, during the year 1881, pay taxes in the State as follows:

To the trustees of the Exempt Firemen's Benevolent Fund, in the city of New York, being two per cent. of the premiums received by it on property located in said city in the year 1880	$605 47
To the treasurers of fire departments of other cities and villages in the State	1,816 89
Total	$2,422 36
Being all that was demanded of the defendant, there being many villages in the State in which property insured by the defendant was located which had no fire department or fire companies, and in which no demand was made upon it for the two per cent. tax.	
To the comptroller of the State of New York $\frac{8}{10}$ths of one per cent. upon the premiums received by it for twelve months prior to July 1, 1881	1,614 29
Making an aggregate of	$4,036 65

The controversy between the parties is as to whether the defendant is liable to pay any tax to the superintendent of the insurance department of the State upon the said premiums received by it in the year 1881, and, if any, what amount.

The superintendent of the insurance department has demanded from the defendant, and claims that it is liable to pay the State the difference between three per cent. upon the gross amount of the said premiums received by it in 1881 from the insurance of property located within the State of New York, and the aggregate amount of the said taxes actually paid by it during that year, thus:

3% on $196,170.22		$5,885 10
Deductions as follows:		
Taxes paid to trustees of benevolent fund in New York city, and to fire departments in other cities and villages	$2,422 36	
Tax on premium paid comptroller	1,614 29	
		4,036 65
		$1,848 45

With interest from—

The defendant claims that it is not liable to the plaintiff for any amount, insisting, first, that the said act of 1865, as amended by the act of 1875, is unconstitutional and void, and not a legitimate exercise of legislative power; and, second, that even if it was a valid law the defendant, by the 8th section of said chapter 542, laws of 1880, as amended by chapter 361, laws of 1881, is exempted from assessment and taxation under the said act of 1865, as amended by said act of 1875, and cannot be lawfully required to pay to the superintendent or to the State any part of the tax imposed by said last two acts; and, thirdly, that if the said act of 1865 is constitutional and valid, and if the said act of 1880, as amended, does not exempt the defendant as above claimed, that it is only liable to pay to the superintendent or to the State under the provisions of the said act of 1865, as amended,
19 two-tenths of one per cent. upon the gross amount of the said premiums received by it for insurance upon property located within the State of New York, being the difference between the three per cent. imposed by said law of Pennsylvania on New York companies and the aggregate amount of the taxes which by then existing laws of New York it was liable to pay.

The question submitted to the court for decision upon the foregoing statement of facts is whether the defendant is liable to pay to the plaintiff or to the superintendent the whole or any, and, if any, what part of the amount claimed as aforesaid by the superintendent, and judgment is to be entered according to its decision under § 1279 of the Code of Civil Procedure.

It is stipulated that either party, upon the argument of this case at the general term, or in the court of appeals, may read any of the

laws of Pennsylvania or New York pertinent to the subject from the statute-books.

New York, May 29, 1882.

LESLIE W. RUSSELL, *Attorney General.*
FIRE ASSOCIATION OF PHILADELHIA,
[SEAL.] A. LOUDON SNOWDEN, *President.*

STATE OF PENNSYLVANIA, }
City and County of Philadelphia, } *ss:*

A. Loudon Snowden, being duly sworn, says that he is the president of the above-named defendant; that the controversy mentioned in the foregoing case is real, and the submission thereof is made in good faith for the purpose of determining the rights of the parties.

A. LOUDON SNOWDEN, *Pres't.*

Subscribed and sworn to this 29th day of May, 1882, at Philadelphia aforesaid, before me, a commissioner for the State of New York. Witness my hand and official seal, at Philadelphia aforesaid, the day and year last above written.

[SEAL.] CHARLES CHAUNCEY,
Commissioner of New York.

STATE OF PENNSYLVANIA, }
City and County of Philadelphia, } *ss:*

On this 29th day of May, 1882, before me, in said city and county, personally appeared A. Loudon Snowden, to me known and known to me to be the president of The Fire Association of Philadelphia, the corporation described in and which executed the foregoing case and submission, who, being by me duly sworn, did depose and say that he resided at Philadelphia, in the State of Pennsylvania; that he was president of the Fire Association of Philadelphia; that he knew the seal of said corporation; that the seal affixed to the foregoing case and submission was the seal of said corporation, and was affixed thereto by its authority, and that he signed his name thereto as president by like authority.

In witness whereof I have hereunto subscribed my name and affixed my official seal, at Philadelphia aforesaid, the day and year last above written.

A. LOUDON SNOWDEN, *Pres't.*
[SEAL.] CHARLES CHAUNCEY,
Commissioner of New York, Resident in the City and County aforesaid.

21 STATE OF NEW YORK, }
Office of the Secretary of State, } *ss:*

I hereby certify that Charles Chauncey, of Philadelphia, county of Philadelphia, and State of Pennsylvania, was, at the time of administering the oath or affirmation mentioned in his annexed certificates, a commissioner for the State of New York, to take the proof and acknowledgment of deeds and other instruments to be used or

recorded in this State, and to administer oaths and affirmations; and that such commissioner was, at the time aforesaid, duly authorized to take the same; and that I have compared the signatures of the said commissioner to the certificates subjoined to the annexed instrument with the signature of such commissioner deposited in this office, and have also compared the impressions of the seal affixed to such certificates with the impression of the seal of such commissioner deposited in this office, and I verily believe the signatures and impressions of the seal to the said certificates to be genuine.

Witness my hand and the seal of office of the secretary of State, at the city of Albany, this 12th day of June, in the year one thousand eight hundred and eighty-two.

[SEAL.] JOSEPH B. CARR,
Secretary of State.

STATE OF NEW YORK, *County of St. Lawrence,* } *ss:*

On this 15th day of June, 1882, before me, the subscriber, personally appeared Leslie W. Russell, attorney general of the State of New York, to me known to be the same person who executed the foregoing submission, and acknowledged to me that he executed the same.

Witness my hand and notarial seal this fifteenth day of June, 1882.

[SEAL.] WILLIAM A. PASTE,
Notary Public.

22 STATE OF NEW YORK, *St. Lawrence County:*

CLERK'S OFFICE.

I, Alanson A. Matteson, clerk of said county of St. Lawrence, and also clerk of the courts of record directed by law to be held therein, do hereby certify that William A. Paste, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a notary public in and for the said county, duly authorized by law to take the same; and, further, that I am well acquainted with the handwriting of the said notary, and verily believe that his signature to the said certificate of proof or acknowledgment is genuine; and I further certify that said instrument is executed and acknowledged according to the laws of the State of New York.

In testimony whereof I have hereunto set my hand and affixed the seal of said county and courts, at Canton, this 15th day of June, 1882.

[SEAL.] A. A. MATTESON, *Clerk.*

23 At a general term of the supreme court of the State of New York, held at the court-house, in the city of Albany, on the second day of February, 1883.

Present: Hon. W. L. Learned, P. J.; D. Boardman, A. Bockes, J. J.

THE PEOPLE OF THE STATE OF NEW YORK
against
THE FIRE ASSOCIATION OF PHILADELPHIA.

The case agreed upon herein between the above parties and submitted to this court under section 1279 of the Code of Civil Procedure having come on to be heard at a general term of said court, and having been argued by Leslie W. Russell, Esq., on behalf of the plaintiff, The People of the State of New York, and by Joseph H. Choate, Esq., on behalf of the defendant, The Fire Association of Philadelphia, and due deliberation having been had, now, upon motion of Evarts, Southmayd & Choate, the attorneys for said defendant, it is—

24 Ordered, That judgment be entered on said agreed case in favor of said defendant, with costs.

[Endorsed:] Supreme court, Albany county. The People of the State of New York against The Fire Association of Philadelphia. Order. Evarts, Southmayd & Choate, defendant's attorneys, 52 Wall St., New York.

25 *Judgment*, $98.07, *February* 14, 1883.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK
against
THE FIRE ASSOCIATION OF PHILADELPHIA.

The case agreed upon herein and submitted to this court having been heard by the general term, and the said general term having by an order duly entered herein directed judgment in favor of the defendant, with costs, and said defendant's costs having been taxed at the sum in that behalf hereinafter stated, now, upon motion of Evarts, Southmayd & Choate, attorneys for said defendant, it is adjudged that said defendant is not liable to pay to The People of the State of New York, or to the superintendent of the insurance department of said State, any part of the amount claimed by said superintendent, as stated in said agreed case, and that The Fire Association of Philadelphia, the defendant aforesaid, recover of The People of the State of New York, the aforesaid plaintiff, the sum of ninety-eight dollars and seven cents, the amount of its costs herein, as taxed.

26 [Endorsed:] Supreme court, Albany county. The People of the State of New York against The Fire Association of Philadelphia. Judgment. Evarts, Southmayd & Choate, defendant's attorneys, 52 Wall street, New York.

27 In the Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK
against
THE FIRE ASSOCIATION OF PHILADELPHIA.

GENTLEMEN: Take notice that the above-named plaintiffs appeal to the court of appeals from the judgment & order of the general term of the supreme court herein entered this day in the clerk's office of the county of Albany, and from each and every part of said judgment.

Yours, &c.,

LESLIE W. RUSSELL,
Attorney General and Plaintiff's Attorney.

To Messrs. Evarts, Southmayd & Choate, attorneys for defendant, and to the clerk of the county of Albany.

Dated Albany, February 14th, 1883.

28 STATE OF NEW YORK }
City and County of Albany, } *ss:*

CLERK'S OFFICE.

I, John Larkin, clerk of the said city and county, and also clerk of the supreme and county courts, being courts of record held therein, do hereby certify that I have compared the annexed copy return, composed of case in submission judgment & order general term and notice of appeal, with the original thereof filed in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof I have hereunto set my hand and affixed my official seal, this 14th day of Feb'y, 1883.

[L. S.] JOHN LARKIN, *Clerk.*

29 [Endorsed:] Supreme court. The People of the State of New York *vs.* The Fire Association of Philadelphia. Copy. Notice of appeal. Leslie W. Russell, attorney general, New Capitol, Albany, N. Y. Filed Feb'y 14, 1883.

30 *Bond for Damages and Costs.*

New York Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK
against
THE FIRE ASSOCIATION OF PHILADELPHIA.

Know all men by these presents that we, Peter Notman, of No. 149 Jovaleman St., city of Brooklyn, State of New York, and George T. Hope, of Bay Ridge, Kings county, and State of New York, are held and firmly bound unto the above-named plaintiffs in the sum of four thousand five hundred dollars to be paid to the said plaintiffs, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and ad-

ministrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the 20th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas the above-named defendant has prosecuted a writ of error to the Supreme Court of the United States, to reverse the
31 judgment rendered in the above-entitled suit by the judges of the supreme court of the State of New York, in and for the third judicial district of said State, in favor of the above-named plaintiffs against the defendant:

Now, therefore, the consideration of this obligation is such that if the above-named defendant shall prosecute its writ of errror to effect, and answer all damages and costs if it fail to make its plea good, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

PETER NOTMAN. [L. S.]
GEO. T. HOPE. [L. S.]

Sealed and delivered and taken and acknowledged this 20th day of June, 1883, before me.

JOHN A. SHIELDS,
U. S. Commissioner, Southern Dist. of New York.

STATE OF NEW YORK, }
City and County of New York, } ss:

Peter Notman and George T. Hope, being severally duly sworn, depose and say, each for himself, that he is worth the sum of
32 nine thousand dollars over and above all his just debts and liabilities.

PETER NOTMAN.
GEO. T. HOPE.

Sworn to this 20th day of June, A. D. 1883, before me.

JOHN A. SHIELDS,
U. S. Commissioner, Southern Dist. of New York.

I approve the foregoing bond as to form and sufficiency.
June 23, 1883.

SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

33 Service of a copy of within bond is hereby admitted.
Albany, June 29th, 1883.

LESLIE W. RUSSELL,
Attorney General, Att'y for Def't.

[Endorsed:] New York supreme court, Albany county. The People of the State of New York against The Fire Association of Philadelphia. Bond for damages and costs.

34 UNITED STATES OF AMERICA, *ss:*

To the people of the State of New York, Leslie W. Russell, attorney general, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and eighty-three, pursuant to a writ of error filed in the clerk's office of Albany county, in said State of New York, wherein The Fire Association of Philadelphia is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated June 23, 1883.

SAM'L BLATCHFORD,
Asssociate Justice of the Supreme Court of the United States.

35 Service of within citation is hereby admitted.
Albany, June 29, 1883.

LESLIE W. RUSSELL,
Att'y Gen'l, Att'y for Def't.

[Endorsed:] U. S. Supreme Court. The Fire Association of Philadelphia, plaintiff in error, against The People of the State of New York, defendant in error. Citation. Evarts, Southmayd & Choate, att'ys for pl'ff in error. Filed June 29, 1883.

36 Albany General Term, November, 1882.

THE PEOPLE *against* THE FIRE ASSOCIATION OF PHILADELPHIA.

Learned, Bockes and Boardman.

BOARDMAN, J.:

By the laws of this State a license for or tax on the right to do business in this State is imposed upon foreign insurance companies of two and eight-tenths per cent. upon the amount of business done within the State, based upon the premiums received by its agents. (Laws of 1875, chap. 465; laws of 1876, chap. 359; laws of 1878, chap. 138, and laws of 1879, chap. 153.) By the laws of Pennsylvania, passed April 4, 1873, a license fee or tax is imposed upon insurance companies of other States doing business in Pennsylvania of three per cent. upon premiums received in that State. Thus by the laws of Pennsylvania a larger tax by two-tenths of one per cent. was required to be paid by New York companies doing business there than by our laws Pennsylvania companies were required to pay here.

For the purpose of putting the companies of the different States upon an equality, our Legislature, by chapter 694, laws of 1865, as amended by chapter 60 of the laws of 1875, enacted, that the
37 companies of any State, which imposed a higher tax than ours upon the companies of this State, shall pay to the superintendant of the insurance department for taxes an amount equal

to the amount imposed by such foreign State. Leaving out of consideration certain sums unpaid to treasurers of fire departments by the defendant, this law would require of the defendant a payment in addition to amounts required and paid under the general laws of 1875, as amended, of two-tenths of one per cent. on premiums received, $196,170.22, which would be $392.34.

The defendant claims that the acts of 1865 as amended in 1875 are unconstitutional and void and not a legitimate exercise of legislative power.

In Barto *v.* Himrod (8 N. Y., 483), the act establishing free schools (Laws of 1849, chap. 140), was held unconstitutional and void, because its validity was made to depend upon a vote of the people of the State. The court, by Ruggles, Ch. J., says: "The Constitution does not authorize the power of legislation to be so delegated. If the legislature cannot delegate to an individual the authority to determine by the mere exercise of his judgment whether a statute ought to take effect or become a law, it follows as a necessary consequence that they cannot delegate it to the whole people. The Constitution has no more authorized it in the latter case than the former." And Willard, J., says: "Instead of becoming a law by the action of the organs appointed by the Constitution for that purpose, it claims to become a law by the vote of the electors." Such is the present case. The law has no force or vitality by virtue of the legislative action of New York, but it is claimed to become a law by virtue of the vote of the Legislature of Pennsylvania. The act in question depends upon no exercise of legislative wisdom, nor is it affected by any consideration of expediency or propriety. It is a submission to the Legislature of Pennsylvania of the authority to say what tax may be imposed upon its insurance companies doing business in this State in certain events. We have divested ourselves of the responsibility by saying, in effect, that the Legislature
38 of Pennsylvania shall determine the rate of taxation. The right of a legislature to submit public acts to a popular vote has been the subject of conflicting opinions in different States, as may be seen by reference to Cooley on Constitutional Limitation, (4th ed., p. 141, [*117], etc.) It may be doubted whether the weight of authorities in other States sustain the case of Barto *v.* Himrod, (*ante*). However that may be, it is authority of our highest court and is binding upon us.

The statute now under consideration is more obnoxious to criticism than the school act. In the latter case it was a submission to the primary source of all legislative power, while in the former case the force and validity of the act is made to depend upon the Legislature of a foreign State. No case is found in the reports of this State directly in point. We are referred, however, by the defendant's counsel to cases under similar statutes, which declare such laws void. (Clark & Morrell *v.* Port of Mobile, 10 Ins. Law Jour., 357; Robinson, J., Morgan Co. Circt. Ct., 23 Weekly Underwriter, 253; 10 Ins. Law J., 361.) The extracts from these opinions in defendant's points, which I am unable to verify, sustain the position that acts like the one under consideration are void, and in excess of

legislative authority. The power to impose taxes must be exercised by our Legislature. It cannot be delegated to the Legislature of another State. (Cooley on Law Taxation, 48.)

We are referred by counsel for the plaintiff to MSS. opinion of Mulkey, J., in Home Insurance Company *v.* Swigert, auditor in the supreme court of Illinois, directly in point, and sustaining the position of the plaintiff in this case. The learned judge, with a single exception, cites only Illinois cases in support of his conclusion, and says: "Whatever the rule may be in other States, it is well settled in this, as will appear from the cases thus cited, that it is competent for the Legislature to pass a law, the ultimate operation of which may, by its own terms, be made to depend upon some contingency, as upon an affirmative vote by the electors of a given district, or upon any other indifferent contingency the Legislature in its wisdom may prescribe." He thus, in effect, thought not citing it, overrules
39 Barto *v.* Himrod (*ante*) which is the law of our State, and the principles enunciated by him makes that a necessity. But Scott, C. J., does not concur in the opinion, and Dickey, J., gives a qualified concurrence only, which would seem to be hostile to the claim of the plaintiff in the case at bar.

The conflicting claims of the parties are very important and far-reaching in their consequences. The court of appeals will doubtless be called upon to determine them. Hence it is not deemed important to do more than express the conviction that the law in question is unconstitutional and void, and gives to the plaintiff no right of action for any portion of the amount claimed.

Judgment is therefore ordered for the defendant with costs.

I concur. A. B.

Learned, P. J., dissents in an opinion.

THE PEOPLE *against* THE FIRE ASSOCIATION OF PHILADEPHIA.

ALBANY, *Jan.*, 1882.

Present: Learned, Boardman, Bockes.

LEARNED, J.:

It does not seem to me that the doctrine of Barto *v.* Himrod, (8 N. Y., 483), applies to the law under consideration. In that case the Legislature did not enact a law; they proposed a law to be enacted by the people. Just as a committee of the Senate or Assembly might report a law to be enacted by the Legislature. Except that part of the so-called law which provided for its submission to the people, there was no legislation whatever, and therein was the unconstitionality.

The present, however, is not, as I think, that case. This law under discussion is enacted by the Legislature. The law is in force. But whether a company shall pay a tax of one amount or another amount depends on varying circumstances. It is immate-
40 rial that those circumstances consist of statutes of other States. Such statutes are here matters of fact, not matters of law, and I see no unconstitutionality in declaring that under one state of facts a company shall pay one tax; under another, another.

The United States internal revenue law imposed a succession tax of one rate if property was given to a stranger, of another rate if it was given to a child; but it could not be said that that law was a delegation of power to the individual to say what tax should be imposed.

Under our ordinary system of taxation the sum which a man shall pay depends upon the amount at which the assessors assess his property. Yet this is not an unconstitutional delegation of the taxing power to the assessors. I do not state these instances as exactly analogous, but as illustrating the idea that taxes may be lawfully imposed, although the amount may depend on facts which shall occur subsequently to the passage of the law.

Let us take another illustration. The United States income tax authorized the party taxed to deduct from his income taxes paid to the State. This might be said, as the defendant argues in this case, to make the tax imposed by the United States dependent on the legislation of the States. And yet it seems to me plain that such legislation as the income tax would not be unconstitutional in any such view, should it be enacted by a State.

In the case first cited the so-called statute was an attempt to authorize the people to enact a law through the ballot-box, so that their vote should alone give authority to the so-called statute. In the present case the law has been enacted. Its validity is not affected by any act of the people or of other State Legislatures. Its operation varies with certain events—events which in this State are not law, but facts, as would be the magnitude of another State or the size of its population.

Nor can I agree with the claim that this statute is contrary to the Fourteenth Amendment [to the Constitution] of the United States. If that amendment, adopted with an intent which is well known, is to have the effect claimed, it would seem to render invalid all
41 State laws of attachment against foreign corporations and non-resident defendants and other provisions by which the State has thus far protected its citizens.

Under the circumstances, as the question or one similar is said to be pending in the Supreme Court of the United States, I do not think it of any use to discuss this point. It is enough to express my strong convictions against the claim thus presented.

It is plain that we should be reluctant to declare a law unconstitutional, especially when it does not violate any what are usually called private rights.

I think that judgment should be given for plaintiff.

42 [Endorsed:] Supreme court, Albany county. The People of the State of New York against The Fire Association of Phila. Copy. Opinions at general term. Evarts, Southmayd & Choate, def'ts' att'ys.

43 *Certified Copy Opinion of Finch, J., Directing Judgment for People.*

In the Court of Appeals of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK, Appellants,
against
THE FIRE ASSOCIATION OF PHILADELPHIA, Respondent.

Leslie W. Russell, attorney general, for appellant.
Joseph H. Choate, for respondent.

44 In the Court of Appeals of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK, Appellants,
against
THE FIRE ASSOCIATION OF PHILADELPHIA, Respondent.

FINCH, *J.:*

The legislation of the State relating to foreign insurance companies is challenged on this appeal as a violation of constitutional right. The act of 1875 (chap. 60), in substance provides that an insurance corporation of another State, seeking to do business here, shall pay to the superintendent of the insurance department, for taxes, fines, penalties, certificates of authority, license fees, and otherwise, an amount equal to that imposed by the State of its origin upon companies of this State seeking to do business there when such amount charged is greater than our own. The evident purpose of the act is to treat the corporations of another State seeking to transact business here precisely as such other State should treat our own corporations seeking to do business there. It rests upon the idea that the comity due from one State to another is not required to
45 be more than equal and reciprocal, and what is wholly a matter of privilege may be granted or withheld upon conditions.

This legislation is assailed, first, upon the ground that it is an unlawful delegation of the legislative power, and the general term have so held upon the authority of Barto *v.* Himrod (8 N. Y., 483). We do not think that case at all decisive of this. What was there denominated the school law came from the hands of the Legislature, not as a law, but as a proposition. Whether it should be a law or not was precisely the question submitted to the popular vote. The Legislature proposed the law, but left it to the people to enact. The process carried out and applied to all bills would have resulted in a complete abdication by the Senate and Assembly of their authority and functions. Instead of making laws they would simply have suggested them, reported them for consideration, but left the judgment upon them, the determination of their expediency and wisdom, to an authority ouside of their own. As to the school law, the people were made the Legislature and left to decide whether the bill proposed should or should not become a law. This court held that the Legislature, under the Constitution, could not so delegate its power, but was bound to determine for itself the expediency of the

measure, and either enact or reject it. But nothing in that decision denied to the Legislature the right to pass a law whose operation might depend upon or be affected by a future contingency. The opinions expressly conceded the existence of such power. It was not denied that a valid statute may be passed to take effect upon the happening of some future event, certain or uncertain. And this was said as to the character of such event, viz: "The event or change of circumstances on which a law may be made to take effect must be such as, in the judgment of the Legislature, affects the
46 expediency of the law, an event on which the expediency of the law in the judgment of the lawmakers depends. On this question of expediency the Legislature must exercise its own judgment, definitively and finally." The statute before us fully answers this description. It came from the hands of the Legislature a complete and perfect law, having at once a binding force of its own, and dependent upon no additional consent or action for its vitality and existence. The question of expediency involved in it was not delegated to any other tribunal, but settled definitively and finally by the Legislature itself. It determined, as a conclusion proper and expedient, that foreign insurance companies, as the price of admission to our territory, should pay in taxes, license fees, and the like precisely what the States which created them should impose upon our companies in excess of our usual rates as the price of admission to the foreign territory. That was the whole question involved. Nothing else in the proposed law remained to be settled, as expedient or otherwise, and that question the Legislature determined for itself, upon its own reasons and its sole responsibility. Neither the law nor its expediency depended upon the legislation of another State. It remained the law, and its expediency was the same, whether other States legislated or not. If they did the contingency arose which the law stood ready to meet; if they did not, it remained none the less the law, although no fact occurred to set it in operation. This court has steadily declined to push the doctrine of Barto *v.* Himrod beyond the point which it decided. In Bank of Rome *v.* Village of Rome (18 N. Y., 39), we sustained as constitutional an act conferring upon municipal authorities certain powers not to be exercised until the act had been approved by two-thirds of the tax-payers. The distinction taken was that the law took effect immediately, and conferred the necessary power, but did not compel the
47 village to act under it unless the tax-payers so determined. The law was complete, although its operation depended upon a contingency, which might or might not happen. A similar distinction was taken in other cases. (Starin *v.* Town of Genoa, 23 N. Y., 439; Bank of Chenango *v.* Brown, 26 N. Y., 467; Clark *v.* City of Rochester, 28 N. Y., 605.) While there were differences of opinion in these cases as to the precise grounds which distinguished them from Barto *v.* Himrod, there was an entire concurrence in the construction put upon the latter case, a construction which makes it inapplicable to the statute under consideration.

But it is argued that this act offends, although not in the same manner as the school law, by leaving the amount of the tax or fine

to the legislative discretion of another State. The argument is that the nature of the attempted legislation is vicious; that what the amount of a tax, fine, penalty, or license shall be is essentially the direct and immediate effect of statutory enactment; that the act in question does not determine it; that it remits it to the Legislature of another State by its enactments to create or change the tax. Authority for this criticism is found in a decision in Alabama (Clark & Murrell *v.* The Port of Mobile, 10 Ins. Law Journ.), and in one in Indiana. (Id., 361.) But the whole argument rests on the single point that the amount of the tax or fine imposed is not definitely fixed by the terms of the statute, but depends above a certain rate upon foreign legislation. Is it true that a fine or tax cannot be imposed unless its amount be stated in the law, and that, if left to be determined by some other tribunal, thereby the legislative power has been delegated? Laws define a multitude of forbidden acts, and impose fines and penalties not exceeding certain amounts, but below those amounts left wholly uncertain and committed to the discretion and judgment of judicial officers or tribunals. It is quite
48 certain, therefore, that the Legislature does not abdicate its functions and delegate its authority when it imposes a fine or penalty without itself fixing the amount, or when it leaves it to be fixed by some other tribunal. But in the statute before us nothing is left to anybody's discretion. That is certain which can be rendered certain, and the act fixes the fine or penalty by reference to an extrinsic fact which determines its amount in excess of a fixed and established rate. Because that extrinsic fact is the legislation of another State, it does not follow that the legislative discretion of such other State is in any manner substituted for our own. The opinion in the case decided in Alabama turns upon what appears to us to be this error. It asserts that the law of which it speaks "authorizes, in effect, the Legislature of Mississippi, speaking through its statutes, which are the subjects of extrinsic proof and not of judicial knowledge in our courts, to fix by law the amount which the treasurer of Alabama shall demand of appellants as a license tax to do business in this State."

A similar inference from our own statute is pressed upon us in the case at bar. But if, when our statute was passed, there had been in existence a law of Pennsylvania imposing upon New York companies a license fee of three per cent., and because of that fact our Legislature had enacted that all Pennsylvania companies should pay a license fee of three per cent., would that law have been a delegation of legislative authority to the State of Pennsylvania? Most clearly not; although the fact of the foreign law lay at the foundation of our legislative judgment and discretion. And if, within a month, the foreign law changed the impost to four per cent., and our own Legislature again ascertaining the fact, and because of it, should change our tax to four per cent., would that be Pennsylvania legislation, and not our own? And what would be certainly constitutional, if done *seriatim*, by several and separate acts, does it
49 become unconstitutional when the same precise and identical result, founded upon exactly the same legislative discretion,

is accomplished by one? If so, a grave constitutional question is made to turn upon the bare form instead of the substance of legislative action.

It seems to us that the whole difficulty arises from a failure to regard the foreign law, relatively to our own legislation, as simply and purely an extrinsic and contingent fact. Such fact, like any other, may justly influence and even occasion legislative action, without at all changing its nature, destroying its discretion or abridging its duties or its judgment. Most laws are made to meet future facts. They are complete when passed, but sleep until the contingency contemplated sets them in operation. A law which defines and punishes murder is none the less complete and authoritative although no murder be committed, and so the contingency it was framed to meet does not occur. Such contingency may sometimes be, instead of a certain and definite fact, one which is variable and changeable. The legislation suited to such a fact and adopted to such a future emergency may properly recognize its movable character, and be itself made flexible to the changing emergency, and this very characteristic is the product of legislative will and discretion, rather than a surrender of it. If a foreign nation should impose upon American shipping onerous and severe harbor dues, with a view of crippling our commerce and gaining for itself our carrying trade, and because of this Congress should pass an act imposing upon the vessels of such nation coming into our ports such and the same harbor dues as by their laws should be at the time charged upon our shipping, the act would be one of retaliation, deliberately intended to operate according to the measure of the foreign law, treated as an existing and contingent fact, but could not justly be said to amount to an abdication by Congress of its legislative discretion and judgment.

50 Possibly we may get nearer to the ultimate point of the objection urged. That would seem to be that while the Legislature might, by a series of separate acts, each passed because of a then existing foreign law, follow its changes, yet it cannot do so by one act which adopts and enacts such future and contingent mutations. This doctrine requires us to hold that a law so framed as to follow and recognize the changes of foreign legislation, and thereby incorporate such changes into its own operation, is a delegation of the legislative power, and therefore inadmissible. We have found no authority for such a broad and general proposition. What has been said upon the subject is to the contrary, except, perhaps, inferentially by the ruling in specific cases. In State *v.* Parker (26 Verm., 365) the general subject was discussed, and it was said: "If the operation of a law may fairly be made to depend upon a future contingency, then it makes no essential difference what is the nature of the contingency so it be an equal and a fair one, a moral and legal one, not opposed to sound policy, and so far connected with the object of the statute as not to be a mere idle and arbitrary one." And it was added: "One may find any number of cases in the legislation of Congress where statutes have been made dependent upon the shifting character of the revenue laws, or the navigation laws,

or commercial rules, edicts, or restrictions of other countries." How true this is, and how dangerous would be a denial of the power to legislate in such manner, may be made more apparednt by examples. The non-intercourse acts of the three years, beginning with 1809, were made in terms dependent upon the action of France and England toward this country, and were to be revived or revoked according to the course of the foreign law, the effect of which was to be determined by the President and declared by his proclamation.

This instance is cited in Bull *v.* Read (13 Grattan, 90) as a law
51 depending upon an uncertain future contingency, and an objection taken in the Federal courts that the power of legislation was transferred to the President was disregarded. (Cargo of Brig Aurora *v.* U. S., 7 Cranch, 386.) In Bank of Michigan *v.* Williams (7 Wend., 540) it appeared that by the ordinance of Congress, passed in 1787, the Governor and judges of the Northwestern Territory were authorized to adopt and publish in the district such laws of the original States, both civil and criminal, as might be necessary and best suited to the circumstances of the district. In 1805 Michigan was made a separate Territory, with a government "in all respects similar" to that provided for the Northwestern Territory. Under this legislation it was held that the Governer and judges of Michigan could legally incorporate a banking institution. The duty of making laws for the Territory was saved only to the National Legislature by its power of disapproval. Congress has legislative power over the formation and procedure of the Federal judiciary. It is provided (sec. 914, U. S. R. S.) that the practice, pleadings and and forms and modes of proceeding in civil causes other than equity and admiralty causes in the circuit and district courts shall conform as near as may be to those existing at the time in like causes in the courts of record of the State within which such circuit and district courts are held. And more specifically it is ordained that jurors to serve in the Federal courts shall have the same qualifications and be entitled to the same exemptions, and shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries then practiced in the State courts. Coming to our own legislation we notice that affidavits taken in another State may be effectual here if taken before any officer authorized by the laws of such State to take affidavits. (3 R. S., [6th ed.,] p. 657, sec. 27.) A deed may be recorded or read in evidence in this State when made by
52 a person residing without the State and in some other State or Territory, if provoked or acknowledged before any officer "authorized by the laws thereof" to take the proof and acknowledgment of deeds. (2 R. S. [6th ed.], p. 1140, sec. 5.) And wills of personal estate duly executed by persons residing out of this State," according to the laws of the State or country in which the same were made," may be proved and established and become valid and effectual here. These illustrations are not strictly analogous, but they tend to show how a law may be made to fit a changing event and follow it, and adjust itself to it, through a series of future mutations, and those, too, made by foreign legislation or the voluntary action of other bodies; and they indicate also the dangers of forbid-

transaction of business within its limits by foreign fire insurance companies, except upon certain express terms and conditions. By the act of 1853, as amended (2 R. S. [5th ed.], p. 772, § 54), fire insurance companies incorporated by any other State were forbidden "directly or indirectly to take risks or transact any business of insurance in this State," unless upon compliance with certain specified conditions. In 1871 (chap. 388, § 5) the prohibition was repeated, except upon the fulfillment of all the requirements of the laws then in force, together with those named in that act. The law now under consideration was then in force, having been passed in 1865. (Chap. 694.) The amendment of 1875 simply added a provision authorizing the superintendent to remit certain fees and charges. The situation, then, is this: The State having the power to exclude foreign corporations determines to do so unless they will submit to certain conditions. It meets the applicant on the border, forbidding admission, as it has a right to do, except on condition that it will fulfill all of the requirements of our statutes relating to foreign corporations, one of which is the very law here assailed. When the corporation comes in it agrees to the conditions. They become binding by its assent. The tax or license fee charged by the act of 1865 is one of these conditions. It is imposed as the price of permission to come within the jurisdiction, and not as a tax upon one already within the jurisdiction. The fourteenth amendment therefore has no application. It can apply to foreign insurance companies only after they have performed the conditions upon which they are entitled to admission. Any other view of the case involves this absurdity: that the foreign company may agree to pay the tax charged by the act of 1865, so as to get within our jurisdiction, and then refuse to pay it, while insisting upon the right to remain. It cannot agree to conditions as the price of admission, and, after having been admitted, turn around and dispute them. Even if the conditions were unconstitutional, which cannot be said of the terms of the act of 1865, considered as conditions, the foreign company could waive the objection (Embury *v.* Connor, 3 Comst., 511; Sherman *v.* McKeon, 38 N. Y., 267; Phyle *v.* Elmer, 45 N. Y., 103), and does do so when it accepts the conditions by coming in under them, and is estopped from raising the question. (Vose *v.* Cockroft, 44 N. Y., 415.) Even where the condition was a violation of the Federal Constitution and the Supreme Court of the United States so declared, they refused to prevent the State from excluding the offending company and revoking its license. (Doyle *v.* Continental Co., 94 U. S., 535.) By that process, even in such a case, obedience could be compelled at the peril of removal from the State. But in the case before us the condition imposed is not a violation of the Federal Constitution upon any construction of the final clause of the fourteenth article, for that relates wholly to persons within the jurisdiction, already there in fact and of right, and their treatment thereafter, and not at all to the terms and conditions on which alone they can come in. This view of the case renders of no importance the argument founded on the word "tax," and the distinction sought to be drawn between that and a license fee. Grant

that it is properly denominated a tax, yet the payment of a specific tax may be imposed as a condition of assent to fire insurance within the State, and, as we have seen, has been so imposed by express and positive law. Its nature is a condition precedent, is not altered by its name. The constitutional difference between the rights of non-resident individuals and foreign corporations is fundamental and apparent. The citizen of another State has a constitutional right to come within our jurisdiction.

The charter of the nation has secured him that right, and we cannot exclude him nor clog his right with conditions, unless in exceptional cases under the police power. But foreign corporations, artificial beings, the product of a law not our own, have no constitutional right to pass their own borders and come into ours. The Federal Constitution has neither granted nor secured any such right.

We may exclude absolutely, and in that power is involved the
58 right to admit upon such conditions as we please. Until they are within our jurisdiction the final clause of article 14, by its own terms, does not apply. While they stand at the door bargaining for the right to come within they may decline to come, but cannot question our conditions if they do. How, then, is the legislation vicious which proposes to treat them precisely as their own State treats our corporations similarly situated? Is exact equality unfair? Must comity become magnanimity or injustice? If we owe courtesy to sister States, do we not also owe protection to our own corporations formed and fostered under our law? Is it vicious to insist for them upon precise equality of treatment? These questions our Legislature answered. The inquiry was within the just range of their discretion. This court, at least, is bound to assume, and finds no difficulty in assuming, that they answered it wisely and justly.

A third ground of objection may be more briefly dismissed. Reference is made to article 3, section 20, of the State constitution, which provides that "any law which imposes, continues, or revives a tax shall distinctly state the tax and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object." We are of opinion that this provision does not relate to a tax imposed as a condition upon a foreign insurance company, and therefore, in fact, in the nature of a license fee, and that the tax covered by the constitutional provision is one general in its provisions and coextensive with the State. (People *v.* Supervisors of Chenango county, 8 N. Y., 326.)

The point taken as to the effect of the law of 1881 (chap. 361, § 8) is substantially disposed of by our decision in People *ex rel. v.* Davenport (MS., March, 1883). We there held that the exemption under the law of 1880 was from the general taxes levied for the gen-
59 eral purposes of the State. The same construction must apply to the act of 1881.

The final question raised is over the amount to be collected. We think the act requires, in the present case, a full payment of three per cent. upon the premiums received, and if any part of it has not been paid because there was no fire department in a particular locality to receive it, such amount must be added to the sum pay-

able to the superintendent. He must receive such sum as with the other payments will equal the three per cent. required.

The judgment of the general term should be reversed and judgment entered for the plaintiffs for $1,848.45, with interest from January 15, 1882, with costs.

"All concur."

(A copy.)

H. E. SICKELS, *Reporter*,
Per C.

I hereby certify the foregoing to be a true & correct copy of the opinion of the court of appeals in the above-entitled action on file in this office, & of the whole thereof.

H. E. SICKELS,
State Reporter,
Per C.

Dated Albany, July 9, 1883.

60 UNITED STATES OF AMERICA.

STATE OF NEW YORK, }
City and County of Albany, } *ss:*

I, John Larkin, clerk of the city and county of Albany, and also clerk of the supreme court, being a court of record held therein, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing *are* a true and complete transcript of the record and proceedings had in the said court, including those had upon remittitur from the court of appeals of the State of New York, in the case of The Fire Association of Philadelphia, plaintiff in error, against The People of the State of New York, defendants in error, as the same remain- of record and on file in this office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Albany, in the county of Albany and State of New York, this 25th day of July, in the year of our Lord eighteen hundred and eighty-three, and of the Inde-
61 pendence of the said United States one hundred and seventh.

[Seal Albany County, July, 1847.]

JNO. LARKIN, *Clerk.*

Endorsed on cover: New York supreme court. No. 247. The Fire Association of Philadelphia, plaintiff in error, *vs.* The People of the State of New York. Filed July 30th, 1883.

OCT 20 1886

119-110

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 15.

THE FIRE ASSOCIATION OF PHILADELPHIA,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

JOSEPH H. CHOATE,
Of Counsel.

IN THE

Supreme Court of the United States.

THE FIRE ASSOCIATION OF PHILADELPHIA, *Plaintiff in Error,* *vs.* THE PEOPLE OF THE STATE OF NEW YORK, *Defendants in Error.*	*October Term*, 1886. *No.* 15.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This is a writ of error to the Supreme Court of the State of New York, to review a judgment rendered by it against the plaintiff in error; and the error assigned is, substantially, that the said Court erred in holding valid the Act of the People of the State of New York, passed May 11, 1865, being chapter 694 of the Laws of 1865, entitled "An Act in relation to the deposits required to be made, and the taxes, fines, fees and other charges payable by Insurance Companies of Sister States," as amended by the Act of 1875, being chapter 60 of the Laws of 1875,

which act was drawn in question by the plaintiff in error in the State Court as being repugnant to the Fourteenth Amendment of the Constitution of the United States, which provides that no State shall—

> "deny to any person within its jurisdiction the equal protection of the laws."

The cause was heard and decided by the said Court upon an agreed statement of facts submitted in the first instance to the General Term of the Supreme Court as provided by section 1279 of the Code of Civil Procedure of the State of New York. This statement of facts was incorporated in the record (pp. 4–8). By this statement it appears, so far as pertinent to the determination of the present question, that the plaintiff in error—

> "The Fire Association of Philadelphia is a corporation created and organized in the year 1820 by and under the laws of the State of Pennsylvania for the transaction of the business of fire insurance, and having its principal place of business in the City of Philadelphia. *In the year* 1872 *it established an agency in the State of New York, which it has ever since maintained. No question is here raised but that it has uniformly complied with all the requirements and conditions* imposed by the laws of this State upon Fire Insurance Companies from other States establishing and maintaining agencies in this State *except* the payment of the tax now in dispute upon premiums received by it in 1881, upon risks located within the State of New York, and which is the subject of this controversy, *and has received from year to year certificates of authority from the Superintendent of the Insurance Department* of this State, as provided to be issued under the Act chapter 466 of the Laws of 1853 and the subsequent acts amendatory thereof"—

copies of which acts, so far as material, are hereto annexed (p. 27 of this brief).

The act of May 11, 1865, being chapter 694 of the Laws of 1865, as amended by chapter 60 of the Laws of 1875, provides as follows:

> "Whenever the existing or future laws of any other State of the United States shall require of insurance companies, incorporated by or organized under the laws of this State, and having agencies in such other States, or of the agents thereof, any deposit of securities in such

> State for the protection of policy-holders or otherwise, or any payment for taxes, fines, penalties, certificates of authority, license fees, or otherwise, greater than the amount required for such purposes from similar companies of other States by the then existing laws of this State, then and in every such case all companies of such States, establishing or having heretofore established an agency or agencies in the State, shall be and are hereby required to make the same deposit for a like purpose in the Insurance Department of the State, and to pay the superintendent of said department for taxes, fines, penalties, certificates of authority, license fees and otherwise, an amount equal to the amount of such charges and payments, imposed by the laws of such State upon the companies of this State and the agents thereof. [And the Superintendent of the Insurance Department is hereby authorized to remit any of the fees and charges which he is required to collect by existing laws, except such as he is required to collect under and by virtue of this act: Provided, however, that no discrimination shall be made in favor of one company over any other from the same State."]

The last clause, enclosed in brackets, was added to the Act of 1865 by the amendment of 1875.

In 1872, *at the time of the establishment of the agency of the plaintiff in error in New York*, it was subjected by the laws of that State to *equal taxation with other companies having agencies there from other States in the Union*, being 2 per cent. and a fraction upon premiums received (p. 6), but the State of Pennsylvania, by an act passed *April 4, 1873*, and ever since in force, enacted as follows:

> Section 10. "No person shall act as agent or solicitor in this State of any insurance company of another State or foreign government in any manner whatever relating to risks until the provisions of this act have been complied with on the part of the company or association, and there has been granted to said company or association, by the Commissioner, a certificate of authority, showing that the company or association is authorized to transact business in this State; and it shall be the duty of every such company or association authorized to transact business in this State to make report to the Commissioner in the month of January of each year, under oath of the president or secretary thereof, showing the entire amount of premiums of every character and description received by said company or association in this State during the year or fraction of a year ending with the 31st day of

> December preceding, whether said premiums were received in money or in the form of notes, credits, or any other substitute for money, and pay into the State Treasury a *tax of three per centum upon said premiums;* and the Commissioner shall not have power to grant a renewal of the certificate of said company or association until the tax aforesaid is paid into the State Treasury."

Thereupon, and not before, by the operation of the New York law of 1865, if valid, the plaintiff in error, as a Pennsylvania Company, became subject to the tax of 3 per cent. upon its premiums, being the percentage of taxation imposed by the State of Pennsylvania upon the agencies of insurance companies from other States within its limits, and being a different and larger tax than the laws of New York imposed upon companies from other States doing the same business, under the same circumstances, within the State of New York, under the sanction of its authority.

In the year 1881 the plaintiff in error disputed the payment of the *increased* tax thus imposed, upon the ground of the invalidity and unconstitutionality of the enactment which provided for it, claiming, in the terms set forth in the record (p. 7)—

> "that the said Act of 1865, as amended by the Act of 1875, is *unconstitutional and void, and not a legitimate exercise of legislative power.*"

The grounds of objection were based upon its alleged repugnancy both to the Constitution of the State of New York and to the Constitution of the United States. The General Term of the Supreme Court, to which the case was first submitted, held it to be repugnant to the Constitution of the State, as not being a legitimate exercise of legislative authority, making the law of the State of New York dependent upon the future action of the legislature of another State. One of the judges, however, dissented, and, after upholding the validity of the law under the Constitution of the State, thus stated his dissent from the claim that the law was invalid under the Fourteenth Amendment (p. 16):

> "Nor can I agree with the claim that this statute is

> contrary to the Fourteenth Amendment to the Constitution of the United States. If that amendment, adopted with an intent which is well known, is to have the effect claimed, it would seem to render invalid all State laws of attachment against foreign corporations and non-resident defendants, and other provisions by which the State has thus far protected its citizens."

From the judgment of the Supreme Court adverse to the State, it appealed to the Court of Appeals (92 N. Y., 311), which reversed the judgment of the General Term, holding that the act complained of was a legitimate exercise of legislative authority, and upholding the validity of the act, also, as against the company, and its constitutionality under the Fourteenth Amendment of the Federal Constitution. The ground of its judgment appears in the opinion incorporated in the record (p. 23-25), and may be thus briefly stated : That the State of New York had the right to exclude foreign corporations altogether from doing business there; that the right to do such business rested only upon comity and implied consent ; that its laws prohibited the transaction of business within its limits by foreign companies, except upon certain express terms and conditions, among which were the requirements of the Act of 1865 ; that by coming in and doing business in the State after the passage of that act, the plaintiff in error had assented to it as a condition; and that the Fourteenth Amendment had nothing to do with the case, because it applied to persons *within* the jurisdiction, and not to corporations from other States seeking to come within the State.

Assignment of Error.

The judgment below is erroneous in holding that the plaintiff in error is liable to pay the tax imposed by the said Act of 1865, as amended by the Act of 1875, and in upholding the constitutionality and validity of said act, whereas said judgment should have held that the plaintiff in error is not liable to pay said tax, on the ground that said Act of 1865 is unconstitutional and void under the provisions of the Fourteenth Amendment of the Constitution of the United States.

POINTS.

First Point.

*That a corporation like the plaintiff in error is a "*PERSON*" within the meaning of the* FOURTEENTH AMENDMENT, *seems no longer debatable since the announcement made by the learned* CHIEF JUSTICE, *in the case of* SANTA CLARA COUNTY *against* THE SOUTHERN PACIFIC RAILROAD COMPANY, 118 U. S., at p. 396, *that all the members of the Court were of the opinion that the corporations in that case, being railroad companies, were properly within the terms of that description.*

We do not, therefore, propose to discuss that question; but, if it is to be considered, we would avail ourselves of the conclusive reasoning of Mr. Justice FIELD in his opinion in the Circuit Court in the *San Mateo case* (13 Fed. Rep., 722, 746–748; SAWYER, *J.*, 758–762)), and in the *County of Santa Clara case* (18 Fed. Rep., 385, 397–404), and would refer to the decisions of this Court in the *Kentucky Railroad Tax Cases* (115 U. S., 321), and the *Chinese Laundry Cases* (113 U. S., 27 and 703; 118 U. S., 356), hereafter cited.

Second Point.

The plaintiff in error was, in 1881, *unquestionably, if a person at all, a person within the jurisdiction of the State of New York.*

(*a.*) It is a part of the agreed statement of facts (p. 4, fol. 14), that the plaintiff in error had, *by direct authority from the State, uniformly maintained its agency within the State from* 1872 *down to the present time.* It transacted its business there *under the*

authority, implied and express, of the State, and *under the usual certificate of authority from the State, granted in such cases* upon compliance with the prescribed conditions. It contributed yearly its quota, by taxation, to the revenues of the State, and *was in all respects, and to every intent and purpose, within the jurisdiction of the State of New York.*

Thus it had, as a corporation, a legal and actual existence within the State by virtue of the legislative authority of New York, and not by virtue of its Pennsylvania charter.

In a certain technical sense, it is true that a corporation, being an artificial creation, brought into existence by a legislative act of the State, is incapable of existence in another State, unless such other State, by the exercise of its legislative authority, permits it to exist there. For all practical purposes connected with the administration of justice and the affairs of State, however, corporations are present wherever they are permitted to engage in the business for which they were created. And when the State of New York, by its general laws, permits them to come within the State to do business, takes the conduct of their business under its sovereign direction, levies taxes upon them, and receives security for their liability to its citizens, it certainly cannot at the same time deny their existence within its territorial limits, and their right to all the protection which the constitution and laws of the country afford. While it is true that a corporation cannot migrate, that is, change its *legal residence* or *citizenship*, it is just as true that, in all other respects, in the transaction of its business, it can, through the medium of its agents, move about with perfect freedom, and, with the consent of the sovereign power, go "within the jurisdiction" of any State.

"Within the jurisdiction" is a familiar phrase, having a well-known legal signification. A person is within the jurisdiction of a State, if, in general terms, he is physically there for any purpose, and, for the time being, subject to its laws and regulations, and liable

to be called upon, by due service of process, to appear in its courts of law. A corporation is in the same situation, when it transacts its business in a State through duly authorized agents, by permission of the State, or when, for any purpose, it appears in a State and appoints therein, as required by law, a legal representative upon whom service of process may be made.

It is *possible* for a foreign corporation to come "within the jurisdiction" of the State. If this be so, certainly there can be no better or higher evidence of the fact that such a corporation is actually within the jurisdiction than the certificate which it, or its agent, receives from the State, authorizing it to transact business therein, and at the same time subjecting it to the jurisdiction of the State and Federal Courts of that locality. Indeed, such a certificate is, under the statutes of New York, the *only evidence* that the foreign corporation is *legally within* the State. *Such a certificate the plaintiff in error has received* from year to year *since* 1872 (p. 4).

See—

Lafayette Ins. Co. vs. *French*, 18 How., 404.
Ex parte Schollenberger, 96 U. S., 369.
Railroad Company vs. *Koontz*, 104 U. S., 5, 10–13.
St. Clair vs. *Cox*, 106 U. S., 350, 355.

(*b.*) The question here presented is not as to the right of the State of New York to *admit* or *exclude* any or all foreign corporations, or even the particular corporation here litigating. *The State has not undertaken to exclude* the plaintiff in error; *it has admitted and recognized* this corporation as a part of its own business community; but now, after having got the company within its territory and in its grasp, seeks to impose upon it an unequal tax, penalty, burden, or condition, which is, as we claim, repugnant to the Constitution of the United States, and therefore a tax, penalty, burden, or condition which it is not within the power of the State to impose. It is on this point, we submit, that the

learned Judge who delivered the opinion in the Court of Appeals is clearly in error; that is, in contending that the plaintiff in error was not, at the time of the imposition of this unequal tax and burden, a person "*within*" the jurisdiction of the State. He says that the Fourteenth Amendment—

> "relates wholly to persons within the jurisdiction, already there, in fact and of right, and *their treatment thereafter*, and not at all to the terms and conditions on which alone they can *come in*." (92 N. Y., 311, at p. 326).

But the plaintiff in error *was already within the jurisdiction of the State of New York; already there in fact and of right, by permission of the State, from* 1872 *to* 1881; and it is the "*treatment thereafter*" of which we complain. The State did not meet it at the threshold and seek to exclude it, but *admitted it on certain conditions*, the legality of which was not disputed, and is not now; and *afterwards*, to wit, after the passage by the State of Pennsylvania, *in* 1873, of its act aimed at foreign corporations, the State of New York sought to impose upon the plaintiff in error, *already there in fact and of right*, the unequal, and therefore unlawful, burden which it did not impose upon any insurance companies within its limits from other States than Pennsylvania.

The plaintiff in error came into the State of New York *in the year* 1872, and *complied with all the conditions then in force* therein (p. 4). Although the law of 1865 was then upon the statute books, yet *it did not really create or provide for any tax or condition, as to this Pennsylvania corporation*, for the contingency, the happening of which alone gave life and force to that law, as against Pennsylvania corporations, namely, the passage of a law by the State of Pennsylvania imposing a tax upon foreign corporations greater than that imposed upon such companies by the laws of New York, did not come to pass *until* 1873. On April 4, 1873, the State of Pennsylvania passed such an act. On that day, therefore, *and not*

before, the act of 1865 sprang into existence as against the plaintiff in error. *When it came into the State there was not*, so far as it was concerned, any *such condition or tax in existence. It had been "within" the jurisdiction of the State an entire year* (1872–1873), *before this tax was imposed.*

Not only so, but if the Act of 1865 is unconstitutional and void, it never was a law of the State of New York, and under no circumstances was the plaintiff in error obliged to recognize it as such.

"An *unconstitutional law* is void, and *is as no law.*"

Ex parte Siebold, 100 U. S., at p. 376.

Third Point.

The plaintiff in error thus being present within the jurisdiction of the State of New York, the attempt of that State to impose upon it a higher tax or license than it imposed upon companies from other States than Pennsylvania, doing the same business under the same circumstances, and this simply because it came from the State of Pennsylvania, was a denial to the plaintiff in error of the equal protection of the laws.

In this connection, it should be remembered that constitutional provisions, designed for the protection and security of persons and property and of personal and property rights, must always receive a liberal construction and a broad application.

Boyd vs. *United States*, 116 U. S., 616, 635.

The Act of 1865 is both prospective and retrospective. It provides that "whenever the existing or *future* laws of any other State" shall impose such higher tax, then all companies of such State "establishing, *or having heretofore established* an agency or agencies" in New York,

shall pay the higher tax. We start, then, with this *fact* in the case, that the Act of 1865, the law in question, *expressly* applies and refers to corporations *which have, before its passage, established themselves in the State, and which, at that time, were already within its jurisdiction.* In express terms, therefore, it affects persons *within the jurisdiction* of the State. And such, we have shown, was the position of the plaintiff in error at the time when this tax was imposed.

If the tax, then, be regarded as a burden imposed, it was an unequal, and therefore unlawful burden. If it be regarded as a condition, it was a condition repugnant to this provision of the Constitution of the United States, and therefore one that the State had no right to impose.

(*a.*) We do not ask too much, nor do we ask as much as the learned judge, who commented on the subject in the Supreme Court of the State, supposed. We do not insist that corporations from other States shall be treated like domestic corporations, or individual citizens, or like corporations from foreign countries, but we do insist and claim that, under the same circumstances, namely, as being corporations from other States of the Union, they shall be treated to the same share of justice and of burdens, and shall each receive equal protection with all others in the same class, that is, all other similar corporations from other States. We insist upon the definition given to this very amendment by this Court in *Missouri* vs. *Lewis*, 101 U. S., 22, 31, when it said:

> "The amendment means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes *in the same place, and under like circumstances.*"

What we claim is, that this Fourteenth Amendment, having necessarily become incorporated, as the supreme law of the land (*Ex parte Siebold*, 100 U. S., at pp. 392 and 398-399), in the Constitution of the State of New York, is equivalent to a requirement that every

form of taxation, fine, penalty, license, or other burden, imposed upon persons or corporations, shall be, under the same circumstances, equal, and forbids this extraordinary legislation by which a corporation from Pennsylvania, transacting business within the State of New York, is to be subjected to a different and greater burden than that which is imposed, under the same circumstances, upon any similar corporation from any other State in the Union.

(*b.*) Prior to the adoption of this amendment to the Federal Constitution, it was substantially held, by this Court and by the State Courts of New York, that there was no limit to the taxing power of the Legislature of New York, and that, however unjust or arbitrary the taxes imposed by it might be, there was no redress. It was also held that there were no limits to the authority of the Legislature, or to the power of the State, in dealing with corporations from other States seeking to transact business within its borders. With regard to the exercise of the latter power, it was held that corporations, not being citizens within the meaning of the second section of the fourth article of the Federal Constitution, were not entitled to the privileges and immunities of citizens of the several States, thereby provided; and so it was held that the business of insurance, not being a part of commerce, the Legislatures of the several States had absolute dominion on the subject of its transaction within their respective limits by companies of other States.

(*c.*) Now, however, by virtue of this amendment, corporations, being clearly persons within its meaning, are entitled, when within the jurisdiction of another State than that which created them, to equal protection of the laws of such State, and a remedy is thus afforded against unjust discrimination, and against this very system of retaliatory laws which it is the object of the present case to test. Certainly, it never could have been intended by the framers of the Fed-

eral Constitution that the several States adopting it should have the power, nevertheless, to wage war upon each other by means of these retaliatory enactments, to which, when once entered upon, it is scarcely possible to fix the limit.

It was expressly provided, as well by the Articles of Confederation (Art. 6) as by the Constitution (Art. 1, § 10, cl. 2), that the States should have no power to enter into bargains, compacts or alliances with one another, and yet, by the adoption of this system of retaliatory laws, if valid, they are bringing each other to terms as effectually as any bargain, compact, or alliance could possibly do. At the date of the adoption of the Constitution, the transaction of the business of this country, including the insurance business, was almost entirely in the hands of individuals, and the idea had scarcely been conceived of the present range of corporate existence, by which so large a portion of the whole business of the country is practically absorbed into the control of corporations, each seeking to press its transactions beyond the limits of the State creating it. It must have been deemed, at the time of the adoption of the Constitution, that the privileges and immunity clause of the Fourth Article was practically sufficient to protect the business and property interests of each of the States and its citizens against such unjust discriminations and retaliations; but there was a temporary failure of interstate protection, arising from the refusal of the courts to extend to corporations the benefit of that clause.

(*d.*) The provisions of the Fourteenth Amendment have fully met the existing evil.

That amendment is not limited in its operation to the personal privileges and immunities of citizenship, nor can its benefits be confined by construction to the protection of the negro and nothing more. The wrongs of the latter, without doubt, furnished the inspiration, the original impulse, to its adoption, but the force of that inspiration has given us its dignified broad and unqualified language. "A Constitution

from its nature deals in generals, not in detail." Both the Amendment and the Act of Congress of 1871, to carry it into effect, have always been recognized by the Courts as reaching far beyond the mere motive for their adoption or enactment, and as extending to the protection of all persons and corporations within the jurisdiction of any State of this Union.

Missouri vs. *Lewis*, 101 U. S., 22.
Kentucky R. R. Tax Cases, 115 U. S., 321, 336, 337, 339.
Soon Hing vs. *Crowley*, 113 U. S., 703.
Barbier vs. *Connolly*, 113 U. S., 27.
Yick Wo vs. *Hopkins*, 118 U. S., 356, 367, 369, 373.
Santa Clara County vs. *Southern Pac. R. R.* 118 U. S., 394, 396.
Pearson vs. *City of Portland*, 69 Me., 278.
City of Portland vs. *City of Bangor*, 65 Me., 120.
Northern Fertilizer Co. vs. *Town of Hyde Park*, 3 Biss., 480.
County of San Mateo vs. *Southern Pac. R. R. Co.*, 13 Fed. Rep., 722.
County of Santa Clara vs. *Southern Pac. R. R. Co.*, 18 Fed. Rep., 385.

(*e.*) There can be no limit to the subject matters in respect to which this amendment secures to all persons within the jurisdiction of the State the equal protection of the laws. It must necessarily apply to every exercise of power by the State.

It applies alike to taxation and to the exercise of any other power by which the legislative action of the State can reach or affect persons, and there must, under the same circumstances, be equality of right and equality of protection. To quote from the headnote in the *San Mateo Case* (13 Fed. Rep., 722)—

> "The Fourteenth Amendment of the Constitution in declaring that no State shall deny to any person within its jurisdiction the 'equal protection of the laws'

imposes a limitation upon the exercise of all the powers of the State which can touch the individual or his property, including among them that of taxation."

"The 'equal protection of the laws' to anyone implies not only that he has a right to resort, on the same terms with others, to the courts of the country for the security of his person and property, prevention and redress of wrongs, and the enforcement of contracts; but, also, that he is exempt from any greater burdens or charges than such as are equally imposed upon all others under like circumstances. This equal protection forbids unequal exactions of any kind, and among them, that of unequal taxation."

Mr. Justice FIELD there says (p. 733):

"It is not possible to conceive of equal protection under any system of laws where arbitrary and unequal taxation is permissible, where different persons may be taxed on their property of the same kind, similarly situated at different rates, where, for instance, one may be taxed at one per cent. on the value of his property and another at two or five per cent., or where one may be thus taxed according to his color, because he is white, or black, or brown, or yellow, or according to any other rule than that of the fixed rate proportioned to the value of his property."

And again (p. 737):

"Taxation on business in the form of licenses may also vary *according to the calling or occupation licensed and the extent of business transacted;* but, even then, there must be uniformity of charges with respect to the *same calling or occupation in the same locality.*."

And this Court has already substantially held that any inequality *in taxation*, or in the imposition of *license fees*, is a violation of the Fourteenth amendment. Section 1977 of the Revised Statutes of the United States provides that—

"*All persons within the jurisdiction of the United States* * * * * * *shall be subject to* LIKE punishment, pains, penalties, *taxes, licenses, and exactions of every kind.*"

Referring to the Fourteenth amendment, this Court has said that §§ 1977 and 1978—

"*partially enumerate the rights and immunities intended to be granted* by the constitution."

Again, speaking of § 1977, the Court said:

> *" This act puts in the form of a statute what had been substantially ordained in the constitutional amendment. It was a step towards enforcing the constitutional provision."*
>
> *Strauder* vs. *West Virginia*, 100 U. S., 311.

It is equally clear that the word "*persons*" in § 1977 includes *corporations*. Section 1 of the Revised Statutes provides that—

> "In determining the meaning of the Revised Statutes, * * * * * the word '*person*' may extend and be applied to partnerships and *corporations*."

(*f.*) As of the power of taxation, so of the exercise of other legislative powers—it must be within the limitation that equal protection is not denied to any person.

So that the suggestion by which the force of our argument is sought to be evaded, that the act of 1865 is an exercise of the power of the State to regulate the business of foreign corporations within its limits, has no longer any force. That power, *in view of this Fourteenth amendment*, is no more unlimited than the power of taxation. It must be exercised always with due regard to affording equal protection, *under the same circumstances*, to every person and every corporation *within* the jurisdiction of the State, and it does most emphatically prohibit the imposition of burdens upon persons or corporations from one State, *simply because they come from that State*, from which corporations of the *same kind*, but coming from *other States*, are *exempt*.

The amendment imposes upon each State the necessity of maintaining in its laws and regulations absolute equality, under the same circumstances, in respect to the same subject-matter, as regards all corporations of the same kind and engaged in the same business, without regard to the place of their origin, or the legislation which is there established, and does most happily put an end to this internecine strife which has

been inaugurated and thus far prosecuted, to a considerable extent, by means of these retaliatory laws. Undoubtedly the State of New York may exclude corporations of other States altogether. It may confine the business of Banking, or of Insurance, or any other business within its limits, to its own citizens, or to corporations established within its own limits, to the exclusion of all outsiders; it may limit the number from each State that may come in; it may impose any conditions of admission which are not repugnant to the Federal Constitution; but to all those *admitted*, it must afford the equal protection of the laws, in the transaction of the *same business, under the same circumstances.* At any rate, it must be true, if, *as here*, the State has once *admitted* the corporation "within its jurisdiction," that thereafter only such burdens and conditions can be imposed upon it as are imposed upon like corporations from other States, doing the same business, under the same circumstances, and in the same locality.

(*g.*) Nor will it do to say that, by a power of *classification*, the irregularity which is prohibited may be lawfully maintained. Classification must be on equal terms, and you cannot classify by themselves the insurance corporations from any one State, or any one country, or any one section, or according to the laws in force in the States from which they come. Yet that is what is done by the act of 1865. Under that law, there may be in the State of New York thirty-seven insurance companies from different States, taxed under thirty-seven different laws. It really amounts to this: that, in the language of the Supreme Court of Maine, these corporations are—

> "denied 'the equal protection of the laws' *on account of the condition of the law of a foreign country.*"
>
> *Pearson* vs. *City of Portland*, 69 Me., at p. 281.

The case last cited is closely analogous in principle to

the one at bar. In 1872 the Legislature of the State of Maine enacted that no person should recover of any city or town in that State damages for injury to person or property caused by defects in highways, if he was, at the time said damage was done, a resident of any country where damage done under similar circumstances is not recoverable by the laws of said country. The Court held the law to be in conflict with the Fourteenth amendment, as denying to the plaintiff, who happened to be a citizen of a country where such damage was not recoverable, the equal protection of the laws.

The Legislative Department has not unlimited power to prescribe a class, or what companies shall constitute a class. Classification must be with equal protection to all under the same circumstances.

See—

Bureau Co. vs. *Chicago, &c., R. R. Co.*, 44 Ill., 229.
Allhands vs. *The People*, 82 Ill., 234.
Hughes vs *City of Cairo*, 92 Ill., 339.
Cooley on Taxation (1st Ed.), p. 128—

all of which authorities require, under Constitutional clauses providing for uniformity and equality of taxation, uniformity and equality also of classification.

Indeed, the decisions of this Court, cited above, dispose of this branch of the subject as well as of the other questions involved.

In *Barbier* vs. *Connolly*, 113 U. S., 27, 31, 32, the Court said that the Fourteenth Amendment—

> "undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that *equal protection and security should be given to all under like circumstances*, in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the Courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of con

tracts; that *no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances;* that *no greater burdens should be laid upon one than are laid upon others in the same calling and condition;* and that in the administration of criminal justice *no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.*"

"*Class legislation, discriminating against some and favoring others, is prohibited,* but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it *affects alike all persons similarly situated,* is not within the amendment."

This language was quoted and approved in *Yick Wo* vs. *Hopkins*, 118 U. S., 356, 367.

In the latter case an ordinance, a police regulation of the City of San Francisco, regulating the laundry business therein, was under discussion. The ordinance divided the owners or occupants of wooden buildings used for such purpose into two classes, both of which were dependent for the continuance of their business on the will of the supervisors, it being optional with the latter to permit one class to continue the business, and to withhold consent altogether from the other. The Court held the ordinance to be a violation of the Fourteenth Amendment, and unconstitutional and void, as discriminating, in its operation, against the Chinese. Speaking of the ordinance, it said (at p. 368):

"It *does not prescribe a rule* and conditions for the regulation of the use of property for laundry purposes, *to which all similarly situated may conform.* It allows without restriction the use for such purposes of buildings of brick or stone; but as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two *classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line.*"

Again, the Court said (at p. 369):

"The Fourteenth Amendment to the Constitution *is not confined to the protection of citizens.* It says: 'Nor

shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the the laws.' *These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.* It is accordingly enacted by § 1977 of the Revised Statutes, that 'All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, *penalties, taxes, licenses and exactions of every kind, and to no other.*' The questions we have to consider and decide in these cases, therefore, are to be treated as involving *the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the Court.*"

Again (p. 373):

"The cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so *unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States.*"

And (p. 374)—

"*The fact of this discrimination is admitted.* No reason for it is shown, and the conclusion cannot be resisted, that *no reason for it exists except hostility to the race and nationality* to which the petitioners belong, and which in the eye of the law is not justified. *The discrimination is therefore illegal,* and the public administration which enforces it is a *denial of the equal protection of the laws,* and a violation of the Fourteenth Amendment of the Constitution."

This Court has further said:

> " The rule of equality, in respect to the subject, only requires *the same means and methods to be applied impartially to all the constitutents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.* There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained. *The different nature and uses of their property justify the discrimination in this respect which the discretion of the Legislature has seen fit to impose.*"
>
> *Kentucky Railroad Tax Cases*, 115 U. S., at p. 337.

And this is all that was decided in the New Jersey *Railroad Tax Cases*, 4 Atlantic Reporter, 578 (May, 1886), namely, that, owing to its peculiar character, railroad property, as such, may be classified by itself.

See also—

State Railroad Tax Cases, 92 U. S., 575.

In another case, where an objection, based on the Fourteenth Amendment, had been made to the enforcement of a statute requiring railroad companies to fence their roads, the Court said:

> " There is no evasion of the rule of equality *where all companies are subjected to the same duties and liabilities under similar circumstances.*
>
> *Missouri Pac. Ry. Co.* vs. *Humes*, 115 U. S., at p. 523.

Finally, the Court has thus stated the principle:

> " The discriminations which are open to objection are those *where persons engaged in the same business are subjected to different restrictions*, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair *that equal right which all can claim* in the enforcement of the laws."
>
> *Soon Hing* vs. *Crowley*, 113 U. S., 703, 709.

Thus we see that, so far as this Court is concerned,

classification is understood to be a matter for general rules, based upon the *nature and character* of business and property, and not for arbitrary selection based on personal characteristics, nationality, or place of origin.

The whole question is nowhere so forcibly presented and discussed as in the opinions of Mr. Justice FIELD and Judge SAWYER in the *San Mateo Case*, 13 Fed. Rep., at pp. 733, 737 and 773–774, where it is clearly shown that classification may be made *according to calling or occupation*, but that there must be—

> "*uniformity of charges with respect to the same calling or occupation in the same locality*" (p. 737).
>
> "It cannot be *arbitrarily made with mere reference to the nationality, color, or character of the owners, whether natural or artificial persons,* without any reference to a difference in the character, situation, or circumstances of the property" (p. 773).

Otherwise, as Judge SAWYER says—

> "*A person may be classified and defined out of the equal protection of the laws*" (p. 773).

See also the Opinions of the same learned Judges in—

County of Santa Clara Cases, 18 Fed. Rep., 385; 396–404; 407–408; 429–435.

Also—

Lexington vs. *McQuillan's Heirs*, 9 Dana (Ky.) 513.

Fourth Point.

A brief reference to the prior cases in this Court which are referred to by the Court of Appeals, as decisive of the rights of the plaintiff in error, will serve to show the distinction which the application of the Fourteenth Amendment has effected between those cases and the case at bar.

In *Paul* vs. *Virginia*, 8 Wall., 168, the defendant Paul,

as the agent of insurance companies in New York, applied to the proper officers of the district in Virginia where he desired to transact business, for a license to act as such agent within the State, but refused to comply with the condition required by the law, that the company for whom he proposed to act should first deposit bonds with the Treasurer of the State, and produce to the officer the Treasurer's receipt. On the ground of his non-compliance with that requirement, the license was refused. He, notwithstanding the refusal, undertook to act in the State as the agent for the New York companies, without any license, and for this violation of the statute was indicted, convicted and sentenced to pay the penalty of fifty dollars prescribed by the laws of the State for such offense. This conviction was upheld by this Court, which denied the application to the case of either the privilege and immunity clauses of the Constitution, or the clause giving power to Congress to regulate commerce between the States, holding that corporations are not *citizens* within the meaning of the first of these clauses, and that the issuing of a policy of insurance was not a transaction of commerce within the meaning of the latter clause. Suppose, however, that the Fourteenth Amendment had been in operation at that time, and that the penalty imposed by the law of Virginia upon the agent of a New York company for transacting insurance business in the State without a license, was one hundred dollars, while upon the agents of companies from every other State than New York it was fifty dollars, and you would have a case more nearly, if not quite, analogous to the case at bar. Would this Court then have hesitated to say that such legislation was practically a denial to the New York corporation, or its agent, of equal protection with that accorded to the corporation from other States or their agents?

In the case of the *Lafayette Insurance Company* vs. *French*, 18 How., 404, an insurance corporation, chartered by the State of Indiana, was allowed by the law of Ohio to transact business in the latter State upon the condition, that service of process upon the agent of the corporation should be considered as service upon the corporation itself. It was held that a judgment against the corporation, ob-

tained by means of such service of process, was good and ought to have been received in Indiana with the same faith and credit that it was entitled to in Ohio; that the State of Ohio had the right to impose such a condition; and that, when the company sent its agent into the State, it must be presumed to have assented to the condition. This Court regarded the condition so imposed as not unreasonable, or in conflict with any principle of public law, and held that it was a proper and reasonable condition, and was one which the State of Ohio had the right to impose as the terms under which a foreign corporation could do business within its borders. But the Court took care to say, in enumerating the conditions imposed, that these might be so imposed—

> "*provided they are not repugnant to the Constitution or Laws of the United States*" (p. 407).

It is in this respect, we submit, that the case at bar differs radically from the case last cited.

The condition that you shall pay a higher tax for doing the *same business, under the same circumstances*, than other persons, or than like corporations, from other States, is repugnant to the Fourteenth Amendment.

Insurance Co. vs. *Morse*, 20 Wall., 445, is in entire harmony with our contention here. There, under the Statute of Wisconsin, which enacted that it should not be lawful for any fire insurance company from another State to do business in Wisconsin, without first filing a written stipulation containing an agreement that the company would not remove any suit for trial into the Federal Courts, the Home Insurance Company of New York, had actually accepted the condition and filed the stipulation. The Court held, that such agreement on the part of the Insurance Company was void, and derived no support from the Statute, and took care to say:

> "None of the cases so much as intimate that conditions may be imposed which are *repugnant to the Constitution and laws of the United States* or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by others" (p. 457).

In *Doyle* vs. *The Continental Insurance Company*, 94 U. S., 535, under the same legislation of Wisconsin, this Court upheld the right of the State of Wisconsin to expel from its limits the agent of an insurance company from another State who had, contrary to the requirements of its statute, removed a case into the Federal Court; but the question there was as to the right of the State to expel or exclude, and the decision, if sustained at the present day, when viewed in the light of the Fourteenth Amendment, has no bearing on the question of the constitutional equality of rights and of protection to be accorded to a corporation from another State, *so long as it is permitted to do business, as the plaintiff in error is and was, within the jurisdiction of the State.*

In *Ducat* vs. *Chicago*, 10 Wall., 410, the Court decided that the statute of the State of Illinois, requiring a license to be taken out by foreign insurance companies, for which six dollars each should be paid, and providing that when such company was located in the City of Chicago, it should also pay to the treasurer of that city two dollars upon the hundred upon the amount of all premiums received, was legal and valid. But suppose that the Illinois Legislature had enacted that insurance companies from New York should pay sixty dollars, while companies from all other States should pay only six dollars, for a license, and that, for business done in the City of Chicago, the former should pay twenty per cent. to the Treasurer of the State, and companies from all other States should pay only two per cent., could such an enactment have been upheld under the Fourteenth Amendment? Would not that have been denying equal protection of the laws to the New York company? Can there be any doubt as to the invalidity of such a statute, when applied to such New York corporations *who are already within the State by its express permission*, for such is the position of the plaintiff in error? Yet that is in substance equivalent to the legislation complained of in this case.

Fifth Point.

The plaintiff in error is not estopped by its acts from denying and disputing the constitutionality of the legislation complained of.

In *Morse* vs. *The Home Insurance Company, supra,* although the company had filed a written stipulation containing the contract with the State which this Court held to be exacted under unconstitutional and void laws, and had thereby secured and enjoyed the benefit of transacting business within the State, yet it was deemed not to be estopped from denying the validity of the agreement and the constitutionalty of the act which exacted it. Here the plaintiff in error signed no agreement. It came within the State and thereby may be deemed to have agreed and complied with whatever requirements should be imposed upon it by the law of the State; but, so far as the pretended law was repugnant to the constitution, it was not law, had no force or effect, and did not in fact impose the condition or the burden which it purported to impose.

> " An unconstitutional law is *void,* and *is as no law.*"
>
> *Ex parte Siebold,* 100 U. S., at p. 376, quoted above.

The authorities cited in this connection by the Court below, will not be found to support the proposition that the plaintiff in error, by simply entering into the State to do business and continuing there while the unconstitutional requirement was in force, is estopped to deny its validity.

Sixth Point.

The judgment of the State Court should be reversed with costs.

JOSEPH H. CHOATE,
Of Counsel for the Plaintiff in Error.

STATUTES OF NEW YORK.

L. 1853, CHAP. 466—AN ACT TO PROVIDE FOR THE INCORPORATION OF FIRE INSURANCE COMPANIES.

Passed June 25, 1853.

§ 23. It shall not be lawful for any fire insurance company, association or partnership, incorporated by or organized under the laws of any other State of the United States, or any foreign government directly or indirectly to take risks or transact any business of insurance in this State, unless possessed of the amount of actual capital required of similar companies formed under the provisions of this act; and any such company desiring to transact any such business as aforesaid, by an agent or agents in this State, *shall first appoint an attorney in this State on whom process of law can be served, and file in the office of the superintendent of the insurance department a certified copy of the vote or resolution of the directors appointing such attorney, which appointment shall continue until another attorney be substituted;* in case any such insurance company shall cease to transact business in this State according to the laws thereof, the agents last designated or acting as such for such corporation shall be deemed to continue agents for such corporation for the purpose of serving process for commencing actions upon any policy or liability issued or contracted while such corporation transacted business in this State, and service of such process for the causes aforesaid, upon any such agent, shall be deemed a valid personal service upon such corporation; and also a certified copy of their charter or deed of settlement, together with a statement under the oath of the president or vice-president, and other chief officer and secretary of the company for which he or they may act, stating the name of the company and place where located, the amount of its capital, with a detailed statement of its assets, showing the amount of cash on hand, in bank, or in the hands of

agents, the amount of real estate, and how much the same is incumbered by mortgage, the number of shares of stock of every kind owned by the company, the par and market value of the same, amount loaned on bond and mortgage, the amount loaned on other security, stating the kind, and the amount loaned on each, and the estimated value of the whole amount of such securities, any other assets or property of the company, also stating the indebtedness of the company, the amount of losses adjusted and unpaid, the amount incurred and in process of adjustment, the amount resisted by the company as illegal and fraudulent, and any other claims existing against the company, also a copy of the last annual report, if any, made under any law of the State by which such company was incorporated, and no agent shall be allowed to transact business for any company, nor shall any agent or broker be allowed to negotiate for or place any risk with any company whose capital is impaired to the extent of twenty per cent. thereof, while such deficiency shall continue, and any company incorporated by or organized under any foreign government, shall, in addition to the foregoing, deposit with the superintendent of the insurance department for the benefit and security of policy holders residing in the United States, a sum not less than two hundred thousand dollars in stocks of the United States or the State of New York, in all cases to be, or to be made to be, equal to a stock producing six per cent. per annum, said stocks not to be received by said superintendent at a rate above their par value, or above their current market value, or in bonds and mortgages on improved unincumbered real estate of the State of New York, worth fifty per cent. more than the amount loaned thereon, or in such stocks and securities as now are or which may hereafter be receivable by the bank department as security for circulating notes. The stocks and securities so deposited may be exchanged from time to time for other securities, receivable as aforesaid, and so long as the company so depositing shall continue solvent and comply with the Laws of this State, may be permitted by the said superintendent to collect the interest or dividends on said deposit. The said deposits shall be in lieu of the investments in the name of trustees, as heretofore required, and upon its

being duly made, either by the transfer of the trust funds, or otherwise, the trustees shall thereby be discharged from all liability, and where a deposit is made of bonds and mortgages, accompanied by full abstracts of title and searches, the fees for an examination of title by counsel to be paid by the party making the deposit shall not exceed twenty dollars for each mortgage, and the fees for an appraisal of property shall be five dollars to each appraiser, not exceeding two, besides expenses for each mortgage. *Nor shall it be lawful* for any agent or agents to act for any company or companies referred to in this section, directly or indirectly, in taking risks or transacting the business of fire or inland navigation insurance in this State, *without procuring* from the superintendent of the insurance department *a certificate of authority stating that such company has complied with all the requisitions of this act which apply to such companies*, and the name of the attorney appointed to act for the company. A certified copy of such certificate of authority with statement, must be filed by the agent in the office of the clerk of every county where such company has agents, and shall be published in the paper in which the State notices are required to be inserted, four successive times after the filing of such statement, as aforesaid, and within thirty days thereafter, proof of such publication by the affidavit of the publisher of such newspaper, his foreman or clerk shall be filed in the office of the said superintendent. The statements and evidences of investments required by this section shall be renewed from year to year in such manner and form as may be required by said superintendent, with an additional statement of the amount of premiums received and losses incurred in this State during the preceding year, so long as such agency continues; and the said superintendent, on being satisfied that the capital, securities and investments remain secure, as hereinbefore provided, shall furnish a renewal of his certificate as aforesaid, and the agent or agents obtaining such certificate shall file a certified copy of the same in the office of the clerk of the county in which such agency shall be established, within the month of January. But any company organized under or incorporated by any foreign govern-

ment may furnish and file such annual statements and evidences in the month of January in each year, made out for the year ending on the preceding thirtieth day of June, if accompanied, also, by an annual supplementary statement, duly verified by the attorney or general agent of the company in this State, showing the amount of risks written, premiums received, losses sustained, and taxes paid in this State for the year ending on the preceding thirty-first day of December; said supplementary statement shall also contain a description of the investments of such company in this country, and such other information as may be required by the said superintendent. (Whenever, by the provisions of this section, it shall be unlawful for any fire insurance company, association or partnership herein specified, to take risks or transact the business of fire insurance within this State through agents or otherwise, it shall be likewise unlawful for any broker or brokers or other persons acting for persons, firms or corporations in this State or elsewhere, to negotiate for or place risks in any such insurance company or in any way or manner aid such persons, firms or corporations in effecting such unauthorized insurances.) Any violation of any of the provisions of this section shall subject the party violating to a penalty of five hundred dollars, for each violation, and of the additional sum of one hundred dollars for each month during which any such agent shall neglect to make such publication, or to file such affidavits and statements as are herein required. Every agent of any fire insurance company, shall, in all advertisements of such agency, publish the location of the company, giving the name of the city, town or village in which the company is located, and the State or government under the laws of which it is organized. The term, agent or agents, used in this section, shall include an acknowledged agent or surveyor, or any other person or persons who shall in any manner, aid in transacting the insurance business of any insurance company not incorporated by the laws of this State (and the term broker or brokers, also used in this section, is hereby declared to include all persons and firms whose business, in whole or in part, it is to negotiate for and place risks, deliver the policies covering the same, and collect the

premiums therefor.) The provisions of this section shall apply to all foreign companies, partnerships, associations and individuals, whether incorporated or not. [*As amended by Laws of 1862, chap. 6, § 1, and chap. 367, § 5; by Laws of 1874, chap. 331, § 1, and by Laws of 1875, chap. 555, § 1.*]

L. 1871, CHAP. 888—AN ACT IN RELATION TO INSURANCE COMPANIES, CORPORATIONS, ASSOCIATIONS, PARTNERSHIPS AND INDIVIDUALS OF FOREIGN GOVERNMENTS, DOING FIRE INSURANCE BUSINESS IN THIS STATE.

Passed May 3, 1871.

§ 3. To determine the amount of such capital the agent or attorney of such foreign insurance company doing fire insurance business in this State, shall, within four months after the passage of this act, and in the month of January of every year thereafter, render to him a detailed statement of the items making up the said capital, and of the deductions to be made therefrom, subscribed and verified by the oath of such agent or attorney, and said superintendent shall have authority to make such examinations in respect to such assets and liabilities as he shall deem proper, and *upon compliance with the requirements of this act it shall be his duty thereupon and from year to year thereafter, to issue to such foreign insurance company a certificate* of the amount of its so determined capital, and that the requirements of this act have been complied with, upon which capital it may transact business in this State, but subject to all the restrictions and limitations of the laws regulating fire insurance companies incorporated under the laws of the State.

§5. *No foreign insurance company* or any agent or attorney thereof *shall be admitted* to transact the business of fire insurance in this State, or take risks, *until*, in addition to all other requirements of the laws now in force in this State, such company *shall comply* with the provisions of this act, *and receive the certificate* of the superintendent of the insurance department, mentioned in the third section of this act.

§ 8. The affairs of every foreign insurance company do-

ing fire insurance business in this State shall be subject to the same supervision and examination by the superintendent of the insurance department as those of fire insurance companies organized under the laws of this State, as to the examination of its books, assets, accounts and general condition; and every foreign insurance company doing fire insurance business in this State, and its agents and trustees, shall at all times be subject to and be required to make the same statements, and to answer the same inquiries, and be subject to the same examinations, and in case of default therein, to the same penalties and liabilities as fire insurance companies organized under the laws of this State, or any of the officers thereof, are or may be liable to by the laws of this State or the regulations of its insurance department; and the said superintendent is hereby authorized, whenever he shall deem it necessary, either in person, or by a proper person or persons by him appointed, to repair to the general office of any such foreign insurance company, wherever the same may be, and make an investigation and examination of the affairs and conditions of such company. *The said superintendent is hereby authorized to cancel and revoke the certificate of any foreign insurance company* refusing or unreasonably neglecting to comply with any of the provisions of this act, or to allow the examination herein provided for to be made, and to prevent such company from doing business in this State.

L. 1873, CHAP. 593—AN ACT TO AMEND AN ACT ENTITLED "AN ACT TO ESTABLISH AN INSURANCE DEPARTMENT," PASSED APRIL FIFTEEN, EIGHTEEN HUNDRED AND FIFTY-NINE.

Passed May 22, 1873.

§ 2. The said superintendent shall have *power to refuse admission to any company*, corporation or association, applying to be permitted to transact the business of insurance in this State from any other State or country whenever, upon examination. the capital stock of such company, corporation or association shall be impaired, and, also, whenever, in his judgment, *such refusal to admit shall best promote the interests of the people of this State.*

119-110

Office Supreme Court U. S.
FILED
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OCTOBER TERM, 1886.

Supreme Court of the United States.

Error to the Supreme Court of New York.

THE FIRE ASSOCIATION OF PHILADELPHIA,
PLAINTIFF IN ERROR,

against

THE PEOPLE OF THE STATE OF NEW YORK,
DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

DENIS O'BRIEN, *Attorney General of New York,*
Of Counsel, Albany, N. Y.

ALBANY:
THE ARGUS COMPANY, PRINTERS.
1886.

United States Supreme Court.

THE FIRE ASSOCIATION OF PHILADELPHIA, PLAINTIFF IN ERROR,
against
THE PEOPLE OF THE STATE OF NEW YORK, DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF FACTS.

The plaintiff in error is a corporation created under the laws of Pennsylvania for the transaction of the business of fire insurance. Its principal place of business is in the city of Philadelphia. In the year 1872, it established an agency in the State of New York, which it has ever since maintained, and it has, from year to year, received certificates of authority to do business therein from the Superintendent of the Insurance Department, as provided by chapter 466 of the Laws of 1853 and the acts amendatory thereof.

As a fee for such privilege and authority, it has paid to various local fire departments throughout the State a percentage or charge of about two per cent upon premiums received, as required by then existing statutes.

Prior to the establishment of its agencies within the State of New York, and in the year 1865, the Legislature of the State of New York passed an act, chapter

694 of the laws of the year last mentioned, entitled "An Act in relation to the deposits required to be made, and the taxes, fines, fees and other charges payable by insurance companies of other States." This statute was in force at the time of the establishment of the agencies of the plaintiff in error, as aforesaid, within the State of New York. The following is a copy thereof:

> "SECTION 1. Whenever the existing or future laws of any other State of the United States shall require of insurance companies, incorporated by or organized under the laws of this State, and having agencies in such other State, or of the agents thereof, any deposit of securities in such State for the protection of policyholders, or otherwise, or any payment for taxes, fines, penalties, certificates of authority, license fees, or otherwise, greater than the amount required for such purposes from similar companies of other States by the then existing laws of this State, then, and in every such case, all companies of such States establishing or having heretofore established an agency or agencies in this State, shall be and are hereby required to make the same deposit for a like purpose in the Insurance Department of this State, and to pay to the Superintendent of said Department for taxes, fines, penalties, certificates of authority, license fees and otherwise, an amount equal to the amount of such charges and payments imposed by the laws of such State upon the companies of this State and the agents thereof."

In 1873 the Legislature of Pennsylvania, by statute passed April fourth of that year, enacted as follows:

> "SECTION 10. No person shall act as agent or solicitor in this State of any insurance company of another State or foreign government, in any manner whatever relating to risks, until the provisions of this act have been complied with on the part of the company or association, and there has been granted to said company or association, by the commissioner, a certificate of authority showing that the company or association is authorized to transact business in this State; and it shall be the duty of every such company or association

> authorized to transact business in this State to make report to the commissioner, in the month of January of each year, under oath of the president or secretary thereof, showing the entire amount of premiums of every character or description received by said company or association in this State during the year or fraction of a year, ending with the thirty-first day of December preceding; whether said premiums were received in money or in the form of notes, credits or any other substitute for money, *and pay into the State treasury a tax of three per centum* upon said premiums; and the commissioners shall not have power to grant a renewal of the certificate of said company or association until the tax aforesaid is paid into the State treasury."

In 1875 the Legislature of New York, by chapter 60 of the laws of that year, amended section 1 of chapter 694 of the Laws of 1865 (*supra*), by adding at the end thereof,

> "and the Superintendent of the Insurance Department is hereby authorized to remit any of the fees and charges which he is required to collect by existing laws, except such as he is required to collect under and by virtue of this act; provided, however, that no discrimination shall be made in favor of one company over any other from the same State."

In the year 1881, the plaintiff in error received premiums for risks insured in the State of New York to the amount of $196,170.22. (See case submitted, fol. 18 of record.)

Upon this business done it paid the following taxes or charges:

To trustees of benevolent fund in New York city, and to various local fire departments,	$2,422 36
To Comptroller, tax of eight-tenths per cent upon premiums under chapter 542, Laws of 1880, and amendments.....	1,614 29
	$4,036 65

It then insisted that it was bound to pay no other tax whatever, claiming that the Act of 1865, as amended by the Act of 1875 (*supra*), was unconstitutional and void.

Upon his part, the Superintendent of the Insurance Department demanded of the company that it pay to him three per cent of the premiums received, less the amounts already paid as above set forth — in other words, the sum of $1,848.45.

Upon a case agreed upon under sections 1279 and 1280 of the New York Code of Civil Procedure, the controversy was submitted to the Supreme Court of the State at General Term. The decision there was favorable to the company. The people appealed to the Court of Appeals, which rendered a decision reversing the judgment of the General Term. Upon the decision of the Court of Appeals, remitted to the Supreme Court, judgment final was entered for the people for the sum of $1,345.45, together with interest and costs, on the 9th day of May, 1883.

The corporation assigned error in that judgment, on the ground that the Act of 1865 is unconstitutional and void under the provisions of the Fourteenth Amendment to the Constitution of the United States, and seeks for the correction of the alleged error by this court.

POINTS.

I.

THE QUESTION AS TO THE VALIDITY AND CONSTITUTIONALITY OF CHAPTER 694, LAWS OF 1865, AS AMENDED BY CHAPTER 60 OF THE LAWS OF 1875, WITH REFERENCE TO THE CONSTITUTION OF THE STATE OF NEW YORK, IS NOT BEFORE THIS COURT. (See Assignment of Error.)

The legislation was assailed in the State courts upon two grounds:

1st. That it was an unlawful delegation of the legislative power, in that its operation was to be affected by a future contingency.

2d. That it was obnoxious to article 14 of the Federal Constitution, and especially the final clause of the first section, which declares that no State shall deny to any person within its jurisdiction the equal protection of the law.

The Court of Appeals expressly decided that the objection under the State Constitution was not tenable, and that it was clearly within the power of the Legislature of the State of New York to enact a statute providing for the imposition of a tax, to be determined by a standard extrinsic to the facts of the administration of the State, to wit, the legislation of other States.

The decision of the Court of Appeals, as to the validity of the act in question, with reference to the Constitution of the State of New York, will be followed by this court.

Township of Elmwood v. Marcy, 92 U. S., 289.
Fairfield v. Gallatin Co., 100 U. S., 47.
Post v. Supervisors, 105 U. S., 667.

II.

THE TAX IMPOSED UPON THE PLAINTIFF IN ERROR UNDER THE ACT OF 1865 IS IN THE NATURE OF A LICENSE FEE. IT IS WITHIN THE SCOPE OF THE POWER OF THE LEGISLATURE OF THE STATE OF NEW YORK TO IMPOSE UPON FOREIGN CORPORATIONS A TAX AS THE PRICE OF THE PRIVILEGE OF DOING BUSINESS WITHIN THE STATE.

It is well settled that the State can prohibit a foreign corporation from coming within its jurisdiction, or it may admit it on such terms as the Legislature shall see fit to impose; and a corporation availing itself of the privilege to do business here must comply with the conditions exacted.

Corporations have no legal existence beyond the territorial limits of the sovereignty by which they were created. They are, it is true, ordinarily permitted to make contracts and transact business in other sovereignties, but this provision is due entirely to the comity of States and not to any absolute right. It is a mere privilege that they may be permitted to enjoy on such terms as

the legislative power may prescribe, and which may, in the discretion of the Legislature, be absolutely withheld.

Bank of Augusta v. Earl, 13 Peters, 519.
Paul v. Virginia, 8 Wall., 168.
Liverpool Ins. Co. v. Mass., 10 Wall., 566.
Cooper Mfg. Co. v. Ferguson, 113 U. S., 727.

In the case of Paul v. Virginia this court said: "The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States — a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such securities for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

In The Cooper Manufacturing Company v. Ferguson, this court said: "The right of the people of a State to prescribe generally by its Constitution and laws the terms upon which a foreign corporation shall be allowed to carry on its busi-

ness in the State, has been settled by this court. (Bank of Augusta v. Earl, 13 Pet., 519; Paul v. Virginia, 8 Wall., 168; Ducat v. Chicago, 10 Wall., 410.")

It is understood that this proposition is not disputed by the plaintiff in error, and that they do not assert that action of the State in that behalf is affected by that provision of the Federal Constitution giving Congress power to regulate commerce, particularly in the present case, as no contract of insurance that the plaintiff in error could enter into could be an instrument of commerce within the meaning of the Federal Constitution.

Paul v. Virginia, 8 Wall., 168.
Nathan v. Louisiana, 8 How., 73.

III.

NOR CAN THE RULE THAT IT IS WITHIN THE SCOPE OF LEGISLATIVE POWER TO IMPOSE A TAX UPON FOREIGN CORPORATIONS AS THE PRICE OF THE PRIVILEGE OF DOING BUSINESS WITHIN THE STATE, BE WEAKENED BY THE ATTEMPTED DISTINCTION BETWEEN THE CASES OF CORPORATIONS DESIRING TO ENTER A STATE TO DO BUSINESS AND THOSE ALREADY CARRYING ON BUSINESS THEREIN AT THE TIME OF THE IMPOSITION OF AN INCREASED TAX.

(*a.*) The plaintiff in error established its agencies in the State of New York in 1872. The Act of 1865, under which the tax herein complained of was imposed upon the plaintiff

in error, was then in force and had been the law of the State for some seven years. It must, therefore, be held that the company began business in the State of New York charged with notice of a possibility of an increased taxation upon it under the provisions of that act. Therefore no argument can be well grounded here which attacks the good faith of the State of New York in regard to the imposition of this tax.

(*b*) The plaintiff in error labors to make a distinction between the status of corporations coming into the State and those already within respecting the exercise of the power of exclusion by the State. No such distinction exists in the law. The power to impose a license tax exists and has always existed, whether exercised or not. The State waived no right by the fact that the agents of the corporation were not actually met on the border by an agent of the State with a schedule of conditions. When the corporation crossed the boundary lines it was chargeable with knowledge of the existence of power and the possibility and probability of its future exercise. The State as a State could not take cognizance of the unimportant fact that the plaintiff in error had come within its jurisdiction to carry on the business of making insurances. To say that the

State cannot now exercise its inherent and inalienable power, after the corporation has set up its business, is tantamount to saying that by its coming into the State, the corporation deprived the State of a portion of its sovereign powers.

(*c.*) The State cannot only prevent foreign corporations from coming into its jurisdiction, but has also the power to drive them therefrom after they have come in and established a business therein.

The Wisconsin cases, arising upon the statute requiring foreign corporations to stipulate not to transfer suits to the Federal courts, are illustrative in the present case. The State Supreme Court held such stipulation binding and constitutional.

Morse v. Home Ins. Co., 30 Wis., 496.

The Supreme Court of the United States reversed the decision of the State court and denied the constitutionality of the act and the binding force of the stipulation.

20 Wallace, 445.

Thereupon a citizen of Wisconsin applied for a *mandamus* against the Secretary of State to compel him to annul the leave granted the company to do business. A writ was awarded by the Supreme Court of Wisconsin, the late Chief Justice Ryan,

in a very able opinion, holding the stipulation valid, and that *mandamus* must issue even though the United States Supreme Court had awarded an injunction against the Secretary of State to prohibit such an act.

State ex rel. Drake v. Doyle, 40 Wis., 175.

A *mandamus* compelling the license was denied.

State ex. rel. Continental Co. v. Doyle, 40 Wis., 220.

The contention came again before the Supreme Court of the United States on appeal from judgment of the United States Circuit Court directing an injunction against the Secretary of State to prevent him from revoking the license. The Supreme Court reaffirmed the unconstitutionality of the act on the ground that the jurisdiction of the courts of the United States could not be impaired even by stipulation, *but that the State of Wisconsin might enforce the penalty by exclusion and reversed the judgment.*

Doyle v. Continental Co., 94 U. S., 535.

And this court, in pronouncing that judgment, said: "The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a State is always revocable."

"A license to a foreign corporation does not involve a permanent right to remain subject to the laws and Constitution of the

United States. Full power and control over its territory, its citizens and its business belong to the State."

"The State has authority at any time to declare that it shall not transact business there. This is the whole point of the case and without reference to the injustice, the prejudice and wrong that is alleged to exist, must determine the question."

Reference is made to this famous litigation simply because from its very character involving as it did a conflict between the State and Federal jurisdiction, the final decision of this court must be regarded absolutely conclusive as to the right of a State to exclude, drive out, banish, at its discretion, or in its caprice a foreign corporation which has been engaged in business within its borders.

IV.

THE ACT OF 1865 AND THE TAX IMPOSED UPON THE PLAINTIFF IN ERROR THEREUNDER, ARE NOT REPUGNANT TO THE FIRST SECTION OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, WHICH DECLARES THAT NO STATE SHALL DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

(*a.*) *The plaintiff in error is not to be regarded as a person within the jurisdiction of the*

State of New York, within the meaning of the amendment.

Whether or not, it has been definitely settled that a corporation within the jurisdiction of the State under whose laws it was organized, is a person within the meaning of the first section of the fourteenth amendment, would not seem to be material in this case, for the utmost that can be claimed for the decisions in the cases of Santa Clara County v. The Southern Pacific Railway Co. (118 U. S.) and the San Mateo case (13 Fed. Report.), is that for certain purposes, corporations are to be regarded as persons *with reference to their status under the laws of the State of their birth.* Outside of the jurisdiction of the State by which they were organized, corporations neither have nor can have any personal quality within the meaning of the amendment.

1. *A corporation can have no legal existence out of the sovereignty by which it was created. It must dwell in the place of its creation and cannot migrate to another sovereignty*

   Bank of Augusta v. Earl, 13 Peters, 519.
   Runnion v. Coster's Lessee, 14 Peters, 122.
   Covington Draw Bridge Co. v. Shepard, 20 How., 233.

2. *They are the creatures of local law and have not even the right of recognition*

in other States except through comity. They cannot make a valid contract outside the State of their origin without the sanction of the foreign State expressed or implied.

Cases cited last above.
Paul v. Virginia, 8 Wallace, 168.
Railroad Co. v. Koontz, 104 U. S., 511.

3. *Only within the State of their origin and there only, in a restricted sense, are they to be regarded as citizens, and that restricted sense does not include them within the meaning of that clause of the Constitution which declares that citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States.*

Liverpool Ins. Co. v. Mass., 10 Wallace, 566.
Paul v. Virginia, *supra.*

4. *The franchise of a corporation; that is to say its existence, its individuality cannot be taxed outside of the State which granted such franchise; nor can any State tax the property of a foreign corporation, except such portion thereof as is actually within its jurisdiction.*

McColough v. Maryland, 4 Wheaton, 430.
State Tax on Foreign Held Bonds, 15 Wall., 300.

5. At common law no mechanism exists by which a corporation can be sued; that is, brought actually within the jurisdiction of the court, except within the State of its birth, unless it voluntarily appears. The expedients devised by statute whereby foreign corporations are made suable, are merely those which compel a voluntary appearance, as a condition for the privilege of doing business within the foreign State

The inherent disabilities of corporations outside the State of their origin are summed up and illustrated by the language of Mr. Chief Justice Waite, in pronouncing the opinion of the court in Railroad Company v. Koontz (*supra*), as follows:

"A citizen of Maine may be sued in California, if he happens to be there in person, and the proper officer serves him personally with the lawful process of the California court. He is still a citizen of Maine, although, in the exercise of one of the privileges of a citizen of the United States, he has been found in California. An individual may, without asking permission of State authorities, do business where he pleases, and, if a citizen of one State, he is entitled to all the privileges and immunities of citizens of the several States. (Const., art. 4., sec. 2.) Not so with corporations. Their rights outside the State, under the authority of which they were created, depend primarily on their charters. If the charter allows it,

they may exercise their chartered privileges and carry on their chartered business in any other State which, by express grant or by implication, permits them to do so. They have no absolute right of recognition in any other State than their own. (Paul v. Virginia, 8 Wall., 168.) And the State which recognizes them, can impose such conditions on its recognition as it chooses, not inconsistent with the Constitution and laws of the United States. If they are recognized and permitted to do business without limitation, express or implied, they carry with them, wherever they go, all their chartered rights, and may claim all their chartered privileges which can be used away from their legal home. Their charters are the law of their existence, and they are taken wherever they go. By doing business away from their legal residence, they do not change their citizenship, but simply extend the field of their operations. They reside at home, but do business abroad."

The disabilities enumerated and illustrated as above are clearly indicative of the utter absence of personal or individual qualities.

These cases cited, both in direct declaration and by clear implication, unmistakably establish the doctrine that in the estimation of the law a corporation *cannot leave the State under whose laws it was organized.* The business that the plaintiff in error carried on in the State of New York was done solely through insurance agents. Can it be said that a man who

is actually an inhabitant of the State of New York, and who sends his money for investment, either in business or in securities, to an agent in the State of Pennsylvania, himself comes within the jurisdiction of the State of Pennsylvania, and by virtue of his investments there can claim to be a "*person within the jurisdiction*" of the State of Pennsylvania, within the meaning of the Fourteenth Amendment to the Constitution of the United States? It is respectfully insisted that the mere statement of such a proposition suggests an answer in the negative. Yet such is the exact relation which a corporation, through its agencies, assumes to the jurisdiction and laws of States other than that in which it was organized, except that the privileges of a corporation are special and limited to the objects named in its charter, while the individual man is the possessor, by inherent and inalienable right, of the power and privilege to do everything which lies within the scope of his volition, subject only to the restraint of general and universal law.

Again, if it were true that a corporation could come within the juris-

diction of a State foreign to that of its birth, in the same sense that an individual man may do so, why should not its personal property follow it into every domicile, so as to be the subject of taxation, as in the case of individuals? Yet, if any State should attempt to enforce such a theory of the law, it would be met and repulsed with the clear declarations of all the courts, Federal and State, forbidding any such imposition on the theory that personal property of a corporation actually situated within the State under whose laws the corporation was organized, cannot be taxed by another State, even though the corporation does business therein.

If the theory of the plaintiffs in error that a foreign corporation, doing business within the State of New York is a person within the jurisdiction of that State, within the meaning of the amendment, be sustained, there will result an irresistible tendency to overthrow absolutely all distinction between domestic and foreign corporations, as regards their privileges. It must follow that a corporation may have omnipresence, wherever organized; that it may at once be within

the jurisdiction, as a *person*, of all the States from Texas to Maine, exercising all its corporate powers in every State of the Union, yet exempt from taxation upon franchise and property, except in the State that gave it birth. The establishment of such a doctrine must be followed by the overthrow of the well-established law that a State has power to interfere in any wise with the operation of foreign corporations coming into its borders, or to discriminate between them and its own corporations, whatever may be the demands of the wisest public policy of the State. It would deprive the State of the right to protect by any legislation its own children from the competition of foreign corporations that might then, *metaphysically speaking*, be within its jurisdiction.

V.

BUT WHETHER OR NOT THE PLAINTIFF IN ERROR WAS A PERSON WITHIN THE JURISDICTION OF THE STATE OF NEW YORK AND ENTITLED TO THE EQUAL PROTECTION OF ITS LAWS, THE TAX IMPOSED UPON IT UNDER THE ACT OF 1865 WAS NOT A DENIAL OF SUCH PROTECTION.

First. It does not appear from the record that the plaintiff in error was taxed under the Act

of 1865 *at a higher rate than other foreign insurance companies doing business within the State of New York. The implied assertion of the plaintiff in error to that effect is not conceded by the defendants in error.*

Second. The first section of the fourteenth amendment granted equality of protection, but not equal privileges.

As was said in *Ex Parte* Kinney (3 Hughes, 9):

> "The amendment does not provide that the privileges shall be equal, but it does provide that protection shall be equal. It establishes equality between all persons *in their right to protection, but does not confer equality in the privileges they are to enjoy.* It provides that whatever privileges the Constitution and laws of the United States confer upon a citizen, as a citizen of the United States, shall be enjoyed without abridgement; and it provides that all persons within the State, whether a citizen of the United States or of the States, or aliens, shall be equally protected by the laws *in whatever privileges, whether equal or not equal, they may have from the United States, or from the State.* However unequal their privileges respectively, yet a foreigner, a citizen of an un-American State, and a citizen of the State, shall have the benefit equally in the State of all remedial laws for the recovery of rights, and of all legal safeguards ordained for the protection of life, liberty and property."

All persons within the jurisdiction of the State are entitled to equal protection, but may not have the same rights. Persons under disability, arrest, imprisonment,

possibly the citizens of a nation with which the country is at war, may be entitled to equal protection; but their privileges and rights, present and prospective, may be restricted. The rights which are to enjoy equal protection are the rights which existed prior to the amendment. No disabilities are removed by it nor is the status of the person changed in any way.

The language of the amendment is not absolute, but relative. When the plaintiff in error established its agencies in the State of New York it had full knowledge of its liability to increased taxation and legislative discrimination against it and in favor of domestic corporations. In other words, it began business here with restricted and conditional rights; and only to the extent of its restricted rights, only to the degree of its liability to the prospective discrimination against it, is it entitled to equal protection. One of the liabilities which it contemplated was the act of the State of which it now complains. Taxation precisely similar to that imposed upon the plaintiff in error has been sustained by this court in the case of the Liverpool Insurance Company v. Massachusetts (*supra*), decided in December, 1870. The validity with reference to the Federal Constitution of a statute of Massachusetts was called in question. That statute

provided a tax upon premiums received by fire insurance companies, as follows:

1st. Of four per cent in the case of an insurance company incorporated under the laws of any government or State other than one of the United States.

2d. Of two per cent in the case of a company incorporated under the laws of any one of the United States other than Massachusetts.

3d. Of one per cent in case of a company incorporated under the laws of Massachusetts.

> The court said (opinion by Mr. Justice Miller): "We have no hesitation in holding that as the law of corporations is understood in this country, the association is a corporation and that the law of Massachusetts, which only permits it to exercise its corporate functions in that State on condition of payment of a specific tax, is no violation of the Federal Constitution, nor of any property protected by said Constitution."

Even, therefore, if the plaintiff in error were a corporation in error within the jurisdiction of the State of New York, and entitled to the equal protection of the laws, such protection extended only to the rights which it possessed to carry on an insurance business within this State, subject to

the liability of being taxed at a higher rate than at the day it established its agencies, and to the possibility of being driven out of the State by the exercise of power, either discretionary or arbitrary.

Any theory of the law which maintains that the rights of the plaintiff in error, which were entitled to equal protection, were any other than those which it had when it established its agencies in this State, or that the effect of the fourteenth amendment was to modify in any respect the relation which it sustained to the State, is tantamount to the declaration that by virtue of the amendment not only was every former distinction between foreign and domestic corporations blotted out, but also that the foreign corporation was placed thereby on a plane of very great advantage over the corporate creations of the State itself.

The plaintiff in error seeks to avoid the logical results of its theory of the law by the deprecating assertion that it does not claim that it has all the rights of domestic corporations or individual citizens. It expresses a willingness to pay the same taxes that are imposed upon corporations simi-

larly situated with itself, provided that the classification be based upon its theory.

Conceding for the sake of the argument the most extreme theory of the scope of the fourteenth amendment that the plaintiff in error can contend for, and that in the present case the matter of classification is material; conceding that the amendment means "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same places and under like circumstances;" conceding also for the same purpose that the Fire Association of Philadelphia was taxed at a higher rate than the corporations of other States doing the same kind of business within the State of New York, it is still submitted:

Third. That the contention of the plaintiff in error that it should be classified as an object of taxation in the same category with all other foreign fire insurance companies is erroneous. *In determining whether the plaintiff in error has been illegally discriminated against in the matter of taxation, the fire insurance corporations of the State of Pennsylvania, doing busi-*

ness within this State, must be classified with domestic corporations of the same character.

The first section of the fourteenth amendment is not only a standard by which the constitutionality of the enactments of the various States, effecting protection to persons within their jurisdiction is to be tested, but it is something more. It is the enunciation of a principle of republican government applicable to a complex republic like that of the United States. It is a declaration that legislation shall be such as not to impair the rights of persons, but also to protect them. In securing to all persons within its jurisdiction the equal protection of its laws, was not the State bound to take into consideration the conditions existing without the State which might or must affect the rights of persons within? Is not the State, in obedience to the imperative declaration of the amendment, bound to extend to fire insurance corporations, organized under its own laws, a protection equal to that afforded by it to a Pennsylvania company doing business within the State? Is it not bound to consider the burdens which

are laid by the State of Pennsylvania upon the New York corporation, when it attempts to do business in that State, in order that it may *equalize the burden and the protection* by imposing upon the Pennsylvania company, doing business within its borders, a similar burden to that which the New York company bears in the State of Pennsylvania.

In fine, under the very stringency of the command of the amendment, is not the State of New York bound to resort to positive legislation, if need be, to overcome a condition of things by reason of which a person within its jurisdiction, by the act of another power, is suffering a practical denial of the equal protection of the law?

The fire insurance companies of New York that went into the State of Pennsylvania to do business, prior to the statute of that State of 1875, were compelled by that statute to pay that State a tax of three per cent upon their premiums received. The effect of that impost of course was not confined to the State of Pennsylvania. It was felt by the New York insurance corporations within the State of their origin and wherever they might do

business. The fire insurance corporations of Pennsylvania doing business within this State, unless a similar tax was imposed upon them, were enjoying an undue advantage over the fire insurance corporations of the State of New York; they were enjoying in a higher degree the protection of the laws from the State of New York than were the corporations of the State of New York themselves.

The purpose of the Act of 1865 was general and impartial. It was aimed at no specific corporation nor class of corporations. It did not declare, as the Legislature had power to declare, that the corporations of a State imposing upon New York corporations a higher tax than that imposed by New York upon foreign corporations, should no longer do business within New York. It simply secured to the domestic corporation the protection of the laws equal to that which it afforded to the foreign corporation.

This court, in Missouri v. Lewis (101 U. S., 22, 31), said:

> "The amendment means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."

This court said in the Kentucky Railroad Tax Case (115 U. S., 337):

> "The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class so that the law shall operate equally and uniformly upon all persons in similar circumstances."

Under these definitions, prescribing the methods of classification for different degrees of taxation, it is submitted that the fire insurance corporations of Pennsylvania and New York, which are carrying on business within the two States, are situated in precisely similar circumstances and surrounded by the same conditions.

Whether the corporations be organized in the State of Pennsylvania or the State of New York, by reason of the comity which exists between the two commonwealths, the States are a common field for business. They are among the largest and wealthiest of the States, and the corporations of both enjoy, in both, all the rights and privileges given to them by the State of their origin.

In determining what constitutes equality of rights and the equal protection of the law, within the various

divisions of the complex governmental system under which we live, a consideration of the special conditions of enactments of one State alone would seem to be inadequate and partial. To say that a State is bound by the amendment to suffer its own citizens to be deprived of the equal protection of the law by an act of another State, would seem to be an unreasonable interpretation of what was intended to secure to all persons the equal protection of the law.

VI.

There is no escape from the conviction that the contention of the plaintiff in error is permeated by an ineradicable vice — a vice that springs from the dilemma in which it is placed. On the one hand it is forced to concede by the body of unquestioned decisions of this court that the State has the right to impose conditions of entry upon a foreign corporation as the price of the privilege of doing business within its borders, and that it may, in discretion, or by the exercise of arbitrary power, drive the corporation out of its jurisdiction after it has established a business therein, and that it may also, by legislation, discriminate in favor of its own corporate creatures. On the other hand it asserts a theory, which, if logically carried out, would obliterate all distinctions between foreign

and domestic corporations, except in so far as it would inevitably give to the foreign corporation a great advantage over the domestic corporation in the very State in which the latter had its origin.

The theory suggested by the plaintiff in error cannot be accommodated to or reconciled with the law as declared by the decisions of this court.

VII.

The judgment of the State court should be affirmed.

DENIS O'BRIEN, *Attorney General*,
Counsel for the Defendants in Error.

119-110

October Term, 1886.

Supreme Court of the United States.

Error to the Supreme Court of New York.

THE FIRE ASSOCIATION OF PHILADELPHIA,
Plaintiff in Error,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

DENIS O'BRIEN, *Attorney General of New York,*
Of Counsel, Albany, N. Y.

ALBANY:
THE ARGUS COMPANY, PRINTERS.
1886.

United States Supreme Court.

THE FIRE ASSOCIATION OF PHILADELPHIA, PLAINTIFF IN ERROR,
against
THE PEOPLE OF THE STATE OF NEW YORK, DEFENDANTS IN ERROR.

Brief for Defendants in Error.

STATEMENT OF FACTS.

The plaintiff in error is a corporation created and organized under the laws of Pennsylvania for the transaction of the business of fire insurance and having its principal place of business in the city of Philadelphia.

In the year 1872 it established an agency in the State of New York, which it has ever since maintained, and it has from year to year received certificates of authority to do business therein, from the Superintendent of the Insurance Department, as provided by chapter 436, Laws of 1853, and the acts amendatory thereof.

The Legislature of New York, by chapter 694 of the Laws of 1865, as amended by chapter 60 of the Laws of 1875, provided that the same amount of tax imposed upon the companies of this State by any foreign State should be imposed by the State of New York upon the companies of such foreign State.

In 1873 the State of Pennsylvania passed an act requiring foreign insurance companies to pay into the State treasury a tax of *three* per cent upon all premiums received upon insurance in that State.

In the year 1881 the plaintiff in error received premiums for risks incurred in the State of New York to the amount of $196,170.22.

It paid altogether a tax of $4,036.65, whereas it should have paid the sum of $5,885.10 — that sum being three per cent on $196,170.22.

The Superintendent of Insurance demanded the payment of the difference in accordance with the act referred to, which was refused.

Plaintiff and defendant agreed upon a submission of the different questions involved, and they were finally decided by the Court of Appeals in favor of the defendants in error.

Plaintiff has appealed to this court alleging that the Act of 1865, as amended by the Act of 1875, is in conflict with the first section of the fourteenth amendment to the Constitution of the United States, which provides that "no State shall deny to any person within its jurisdiction the equal protection of its laws."

This is the only question presented to this court upon this appeal.

POINTS.

I.

THE DECISION OF THE COURT OF APPEALS ON THE CONSTRUCTION OF THE CONSTITUTION AND STATUTES OF NEW YORK, WILL BE FOLLOWED BY THIS COURT.

Township of Elmwood v. Marcy, 92 U. S., 289.
Fairfield v. Gallatin Co., 100 U. S., 47.
Post v. Supervisors, 105 U. S., 667.

Questions not decided in the State court because not raised and presented by the complaining party, will not be re-examined in this court upon a writ of error.

Detroit City R. Co. v. Guthard, 114 U. S., 133.

II.

THE FIRST SECTION OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES IS NOT APPLICABLE TO THIS CASE.

(*a.*) The Act of 1875, chapter 60, provides as follows:

"Whenever the existing or future laws of "any other State of the United States shall "require of insurance companies incorpo- "rated by, or organized under, the laws of "this State, and having agencies in such "other States, or of the agents thereof, any "deposit of securities in such State for the "protection of policyholders or otherwise, "or any payment for taxes, fines, pen-

"alties, certificates of authority, license "fees or otherwise, greater than the amount "required for such purposes from similar "companies of other States by the then "existing laws of this State, then and in "every such case all companies of such "States establishing, or having heretofore "established, an agency or agencies in the "State, shall be and are hereby required to "make the same deposit for a like purpose "in the Insurance Department of the State, "and to pay the Superintendent of said "department for taxes, fines, penalties, cer- "tificates of authority, license fees and "otherwise, an amount equal to the amount "of such charges and payments imposed "by the laws of such State upon the com- "panies of this State, and the agents "thereof; and the Superintendent of the "Insurance Department is hereby author- "ized to remit any of the fees and charges "which he is required to collect by existing "laws, except such as he is required to col- "lect under and by virtue of this act; "provided, however, that no discrimination "shall be made in favor of one company "over any other from the same State."

The State of Pennsylvania, by an act passed April 4, 1873, provided that:

"No person shall act as agent or solicitor "in this State of any insurance company of

"another State or foreign government in any "manner whatever relating to risks, until "the provisions of this act have been com- "plied with on the part of the company or "association, and there has been granted to "said company or association by the com- "missioner a certificate of authority show- "ing that the company or association is "authorized to transact business in this "State; and it shall be the duty of every "such company or association authorized to "transact business in this State to make "report to the commissioner in the month "of January of each year, under oath of the "president or secretary thereof, showing the "entire amount of premiums of every char- "acter or description received by said com- "pany or association in this State during "the year or fraction of a year ending with "the thirty-first day of December preceding; "whether said premiums were received in "money or in the form of notes, credits or "any other substitute for money, *and pay* "*into the State treasury a tax of three per* "*centum* upon said premiums; and the com- "missioners shall not have power to grant a "renewal of the certificate of said company "or association until the tax aforesaid is "paid into the State treasury."

The Legislature of a State has the power to impose upon foreign corporations doing

business therein such terms for the privilege granted as it may deem proper.

Such corporations have no legal existence beyond the territorial limits of the sovereignty by which they were created; they may transact business in other States on such conditions as the legislative power may prescribe, but they may also be absolutely prohibited therefrom in its discretion.

The right of the people of a State to prescribe generally by its Constitution and its laws the terms upon which a foreign corporation shall be allowed to carry on its business therein, has been settled by this court.

Cooper Manufacturing Co. v. Ferguson, 113 U. S., 732.

A statute of Massachusetts provided a tax upon premiums.

1st. Of four per cent upon any insurance company incorporated under the laws of any government or State, other than one of the United States.

2d. Of two per cent upon a company incorporated under the laws of any one of the United States other than Massachusetts.

3d. Of one per cent upon a company incorporated under the laws of Massachusetts.

It was held by this court that a foreign corporation may be taxed by a State for the privilege of conducting their corporate business within the latter.

Liverpool Ins. Co. v. Massachusetts, 10 Wall., 566.

Certain conditions were imposed by the laws of Illinois upon foreign insurance companies, a compliance with which authorized them to do business in the State. One of the conditions was that companies doing business in Chicago should pay to the city the sum of two per cent upon the amount of all premiums received and it was made unlawful for them to transact any further business until the payment was made.

The agent of the company complied with all the conditions except the one stated. He received his license from the State authorities and refused to pay the city anything.

Held, that the conditions were lawful and the company must pay.

Ducat v. City of Chicago, 10 Wall., 410.

By certain statutes State officials were authorized to grant to foreign insurance companies, upon complying

with certain terms, a license to transact the business of insurance within the State, and it was held:

1st. That such statutes are not repugnant to that clause of the Constitution which declares that the citizens of each State shall be entitled to all the privileges and immunities of a citizen in the several States.

2d. Special privileges enjoyed by citizens in their own States are not secured by it in other States.

3d. Corporations are not citizens.

4th. Such statutes are not in conflict with the clause of the Constitution which declares that Congress shall have power to regulate commerce with foreign nations, and among the several States.

5th. The issuing of a policy of insurance is not a transaction of commerce.

Paul v. Virginia, 8 Wall, 168.
See, also, Bank of Augusta v. Earl, 13 Pet., 586.
Lafayette Ins. Co. v. French, 18 How., 404.

The amendment under consideration provides that no State shall deny to any person *within its jurisdiction* the equal protection of the laws.

It is submitted that a foreign corporation who enters a State upon certain specified conditions may not afterwards dispute them.

The tax in question "is imposed as the price of permission" to enter the State, it is not a tax upon a corporation already there. This amendment, therefore, has no application.

6th. A fire insurance company made an agreement in pursuance of a statute of Wisconsin that it would not remove any suit against it for trial into a Federal Court.

This agreement was held to be repugnant to the United States Constitution and void.

Insurance Co. v. Morse, 20 Wall., 445.

But this court afterwards held that although the agreement was void, the State of Wisconsin might exclude the company from doing business therein.

Doyle v. Continental Ins. Co., 94 U. S., 535.

The case of the County of San Mateo v. The Southern Pacific Railroad Company (13 Fed. Rep., 722) has no application, as the Southern Pacific Railroad Company was a domestic

with certain terms, a license to transact the business of insurance within the State, and it was held:

1st. That such statutes are not repugnant to that clause of the Constitution which declares that the citizens of each State shall be entitled to all the privileges and immunities of a citizen in the several States.

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The case of the County of San Mateo v. The Southern Pacific Railroad Company (13 Fed. Rep., 722) has no application, as the Southern Pacific Railroad Company was a domestic

corporation and the tax imposed was a property tax.

Had the defendant therein been a foreign corporation the prior adjudications of the court would have required a different result.

But it is submitted that the fourteenth amendment has no such broad and sweeping effect as that given by the decision cited.

It is very doubtful whether it was not intended solely for the protection of the African race, and it must be a case of very grave and grevious oppression on the part of a State that would warrant the interference of this court by reason of its provisions.

Slaughter-House Cases, 16 Wall., 36.

The decision of the Court of Appeals of New York was right and should be affirmed by this court.

DENIS O'BRIEN,
Attorney General of New York,
For Defendants in Error.

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